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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 602

STATE OF ALABAMA, PETITIONER,

vs.

KING AND BOOZER, A PARTNERSHIP COMPOSED
OF TOM COBB KING AND SIMON ELBERT
BOOZER, AND UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF ALABAMA

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

7

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OF THE STATE OF ALABAMA

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[fol. 1]

[Caption omitted]

[fol. 2]

**IN CIRCUIT COURT OF MONTGOMERY COUNTY,
ALABAMA**

In Equity. #12047

**KING & BOOZER, a Partnership Composed of TOM COBB KING
and SIMON ELBERT BOOZER, Residents of Calhoun County
Alabama,**

vs.

THE STATE OF ALABAMA

**NOTICE OF APPEAL FROM FINAL ASSESSEMENT BY THE STATE
DEPARTMENT OF REVENUE OF THE STATE OF ALABAMA ON,
TO WIT, MAY 15, 1941, ASSESSED AGAINST KING & BOOZER, A
PARTNERSHIP COMPOSED OF TOM COBB KING AND SIMON EL-
BERT BOOZER, RESIDENTS OF CALHOUN COUNTY, ALABAMA,
THE SUM OF \$1,236.71 TAXES AND \$123.67 PENALTIES AND
INTEREST, ASSESSED PURSUANT TO THE PROVISIONS OF THE
ALABAMA SALES TAX ACT, ACT NUMBER 18, HOUSE BILL 82,
APPROVED FEBRUARY 8, 1939, FOR THE PERIOD JANUARY 1,
1941, TO MARCH 31, 1941, BOTH INCLUSIVE—Filed May 16,
1941**

King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, Residents of Calhoun County, Alabama, with its office and principal place of business in Anniston, Calhoun County, Alabama, hereby files notice of appeal from final assessment made by the State Department of Revenue of Alabama, for sales taxes pursuant to Act No. 18, House Bill 82, approved February 8, 1939, for the period January 1, 1941 to March 31, 1941, both inclusive, said final assessment being dated March 15, 1941.

Preliminary notice of such assessment was made by the State Department of Revenue on May 15, 1941, and was duly protested in writing by King & Boozer, a partnership as aforesaid, within the time allowed by law, on May 15, 1941, at which time King & Boozer, a partnership as aforesaid, did waive notice and demand for the payment of any alleged deficiencies in sales taxes claimed to be due by it for the period January 1, 1941 through March 31, 1941, and further waived any and all notice which might be required

by law for the entry or the making on the 15th day of May 1941 of a deficiency assessment by the State Department of Revenue against the partnership of King & Boozer for the period January 1, 1941, through March 31, 1941 aforesaid, and it further waived notice of hearing on said assessment and consented to a hearing by the State Department of Revenue on the 15th day of May 1941.

Upon a hearing before the State Department of Revenue upon the protests aforesaid of King & Boozer, a partnership as aforesaid, preliminary notice of assessment above mentioned was made final by the State Department of Revenue [fol. 3] on May 15, 1941, in the amount of \$1,372.71, or \$1,236.71 Taxes, and \$123.67 penalties.

This notice is filed as provided by law with the State Department of Revenue and with the Register of the Circuit Court of Montgomery County, Alabama, in equity, and this appeal is taken pursuant to the provisions of Section 18 of Act Number 18, House Bill 82, approved February 8, 1939, and pursuant to, and in conformity with Act Number 154, approved April 21, 1936, being entitled "An Act to amend Section 103 of Article IV of an Act entitled 'To provide for the General Revenue of the State of Alabama', approved July 10, 1935, pertaining to and providing for appeals from final assessments by the State Tax Commission".

In addition to the filing of this notice of appeal, appellant has given bond contemporaneously herewith in double the amount of taxes and penalties shown to be due by final assessment, together with all costs accruing by virtue of this appeal, payable to the State of Alabama, and conditioned as provided by law.

Appellant alleges that said final assessment made as aforesaid is illegal and void, among other things, in each of the respects as shown by the protests made to such assessment, a copy of which is hereto attached and made a part hereof;

Wherefore, appellant prays that said assessment be annulled, vacated, and held for naught.

King & Boozer, a Partnership Composed of Tom Cobb King and Simon Elbert Boozer, Residents of Calhoun County, Alabama, by Tom Cobb King, Thomas D. Samford, Attorney. Fred L. Blackmon, Knox, Liles, Jones & Blackmon, Attorneys.

The foregoing notice of appeal to the Circuit Court of Montgomery County, Alabama, in equity, was duly filed in

this office on the 16 day of May, 1941, within the time required by law.

This the 16 day of May, 1941.

State Department of Revenue, by Julia Klinge, Secretary.

[fol. 4] The foregoing notice of appeal to the Circuit Court of Montgomery County, Alabama, in equity, was duly filed in this office on the 16th day of May, 1941, within the time required by law, at which time the appellant executed and delivered the bond required by Act No. 154, approved April 31, 1936, being Act No. 154 of the General and Local Laws of Alabama, Extra Session, 1936, p. 172.

George H. Jones, Jr., Register, Circuit Court of Montgomery County, Alabama, in Equity.

PROTEST TO PROPOSED ASSESSMENT

To the State Department of Revenue of the State of Alabama, John C. Curry, Commissioner of Revenue of the State of Alabama:

Comes now King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, both residents of Calhoun County, Alabama, and protests the proposed assessment made against it as shown by notice of assessment dated May 15, 1941, and received by it on May 15, 1941 which notice and assessment purports to assess a tax of \$1,236.71 under the provisions of the Alabama Sales Tax Act, Act No. 18, House Bill 82, approved February 8, 1939 for the period January 1, 1941 to March 31, 1941, both inclusive, together with the sum of \$123.67, assessed as penalty and the sum of \$—, interest upon the amount of said tax at the rate of one-half of one per cent per month from the 20th day of April, 1941.

The grounds of this protest are as follows:

1. The assessment of May 15, 1941, above mentioned is illegal and void for the reason that said assessment is based upon sales of tangible personal property to the United States or to the United States through one of its agencies or instrumentalities which are immune from taxation by the State of Alabama under the Constitution of the United States.

2. The assessment of May 15, 1941 above mentioned is illegal and void for the reason that said assessment is based on sales of tangible personal property to the United States which are immune and exempt from taxation by the State of Alabama under the Constitution of the United States and the Statutes of Alabama.

3. The assessment of May 15, 1941 above mentioned is illegal and void for the reason that said assessment is made upon sales of tangible personal property exempt from taxation under Subsection (a) of Section 7 of Act No. 18 of the Legislature of Alabama, session of 1939, as approved [fol. 5] February 8, 1939, as it appears in General Acts of Alabama, Regular and Special Session of 1939 at pages 16, 18.

4. The assessment of May 15, 1941 above mentioned is illegal and void for the reason that said assessment was made upon sales of tangible personal property to an agent or instrumentality of the United States on or for the account of the United States exclusively, and immune from taxation under the Constitution of the United States and the Statutes of Alabama.

5. The assessment of May 15, 1941 is illegal and void for the reason that said assessment was made upon sales of tangible personal property not consummated within the taxing jurisdiction of the State of Alabama.

6. The assessment of May 15, 1941 above mentioned is illegal and void for the reason that said assessment was made upon or with respect to sale of tangible personal property purchased by the United States, or for the use and benefit of the United States through an agent or instrumentality of the United States, all of which such sales are immune from taxation by the State of Alabama under the Constitution of the United States and the Statutes of Alabama for the reason that said assessment was of or on account of sales made to the United States, or to the agents or instrumentalities of the United States on and for the behalf of the United States exclusively.

7. The assessment of May 15, 1941 above mentioned is illegal and void for the reason that said assessment is based upon sales made to the United States, the taxation of which

by the State of Alabama is violative of the Constitution of the United States.

King & Boozer, a Partnership Composed of Tom Cobb King and Simon Elbert Boozer, (Signed) by Tom Cobb King, Partner.

[File endorsement omitted.]

[fol. 6] Supersedeas bond on appeal for \$2,800.00, approved and filed May 16, 1941, omitted in printing.

[fol. 7] Cost bond on appeal for \$500.00, approved and filed May 16, 1941, omitted in printing.

[fol. 8] BEFORE THE STATE DEPARTMENT OF REVENUE

The following is a transcript of the records of the State Department of Revenue in the matter of the assessment of sales tax against King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, of Calhoun County, Alabama, for the period January 1, 1941, to March 31, 1941, both inclusive, for the purpose of an appeal to the Circuit Court of Montgomery County, in equity:

PROPOSED ASSESSMENT

Whereas, said return and computation have been examined and approved by the Department, and the same have been ascertained and determined to be correct; and

Whereas, said Taxpayer has expressly waived in writing any and all notice required to be given by law for the making or entry of this assessment on this date;

It is Ordered by the State Department of Revenue and the State Department of Revenue does hereby assess against said Taxpayer the sum of One Thousand Two Hundred Thirty-six and 71/100 Dollars (\$1,236.71), as and for the privilege or license tax for said period, plus the sum of [fol. 9] One Hundred Twenty-three & 67/100 Dollars (\$123.67) penalty thereon, due by said Taxpayer under the provisions of said Act, together with interest upon the

amount of said tax at the rate of one-half of one percent per month, or any fraction thereof, from the date the same became due and payable under the provisions of said Act, namely, from the 20th day of April, 1941; and it is further ordered that a hearing upon said assessment be and the same is hereby set for 10 o'clock A. M., on the 4th day of June, 1941, and that due notice of said hearing be given to said Taxpayer, as required by law, to appear and show cause, if any, why said assessment should not be made final.

Dated the 15th day of May, 1941.

State Department of Revenue, by (Signed) John C. Curry, Commissioner of Revenue. (Signed) Julia Klinge, Secretary.

SALES TAX RETURN

Required by House Bill 82, Approved Feb. 8, 1939
For the Period Beginning Jan. 1, 1941 and Ending March 31, 1941

King & Boozer, Anniston, Ala.

State kind and class of business: Partnership.

Computation of Tax

1. Sales only to Dunn-Hodgson Const. Co. at Ft. McClellan, Tax not previously paid	\$61,835.63
5. Total amount remaining as measure of tax (2 minus 4)	\$61,835.63
6. Amount of Tax (Equal to 2% of item 5)	\$1,236.71
14. Total amount of Tax due (Total of item 6 and item 13)	\$1,236.71
16. Add penalty and interest if any (See penalties page 4) Pen. \$123.67, Int. to 5/21/41, \$12.37	\$ 136.04
17. Total due for which remittance is attached	\$1 372.75

[fol. 10] We acknowledge receipt of a copy of the foregoing notice, May 15, 1941.

King & Boozer, by Tom Cobb King, Partner.

BEFORE STATE DEPARTMENT OF REVENUE

NOTICE OF ASSESSMENT

(For deficiency assessment)

To: King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, Anniston, Calhoun County, Alabama, Taxpayer:

Notice is hereby given that upon examining and auditing your records and from other information, and upon examining the return made by you of the gross proceeds of sales or gross receipts of business and the privilege or license tax computed thereon under the provisions of the Alabama Sales Tax Act (Act No. 18, H. 82, approved February 8, 1939) for the period: January 1 through March 31, 1941, the State Department of Revenue has ascertained and determined that the said return is incorrect and the Department has computed the correct amount of said tax due by you for said period and has notified you thereof, which said amount was not paid within ten (10) days after demand; and the Department has on this date, after allowing credit for the amount paid by you, made and entered a deficiency assessment against you in accordance with said notice and demand in the amount of Twelve Hundred Thirty-six and 71/100 Dollars (\$1,236.71), as and for the tax due by you for said period, plus the sum of One hundred twenty-three and 67/100 Dollars (\$123.67) penalty thereon under the provisions of Section XIV of said Act for failure to pay the tax levied by said Act within the time required by law, together with interest upon the amount of said tax at the rate of $\frac{1}{2}$ of 1% per month, or any fraction thereof, from the date the same became due and payable under the provisions of said Act, which sums in the aggregate amount to Thirteen hundred seventy-two and 75/100 Dollars (1,372.75) computed to the date of this notice.

As provided by Section XVII of said Act, you are hereby notified to appear before this Department at 10 o'clock [fol. 11] A. M. on the 4th day of June, 1941, and show cause, if any, why such assessment should not be made final.

This notice is sent you by registered mail as provided by said Act.

In Witness Whereof, the State Department of Revenue, acting by and through John C. Curry, as Commissioner of Revenue, hereunto sets its name and official seal, this the 15th day of May, 1941.

State Department of Revenue, by (Signed) John C. Curry, Commissioner of Revenue.

We acknowledge receipt of a copy of the foregoing notice, May 15, 1941.

King and Boozer, by Tom Cobb King, Partner.

WAIVER OF NOTICE AND DEMAND, ETC.

To the State Department of Revenue, Montgomery, Alabama:

The undersigned do hereby waive notice and demand for the payment of any alleged deficiency in sales tax claimed to be due by us for the period January 1, 1941 through March 31, 1941; and do further waive any and all notice which may be required by law for the entry or making on this the 15th day of May, 1941, of a deficiency assessment by the State Department of Revenue against us under said Act for said period. Notice of hearing on said assessment is hereby waived and we hereby do consent that a hearing on said assessment be held on this the 15th day of May, 1941.

Dated May 15, 1941.

King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, by (Signed) Tom Cobb King, Partner.

Received, May 15, 1941.

State Department of Revenue, (Signed) Julia Klinge, Secretary.

[fol. 12] Protest omitted. Printed side page 4 ante.

[fol. 13] 6. The assessment of May 15, 1941, above mentioned is illegal and void for the reason that said assessment was made upon or with respect to sales of tangible personal

property purchased by the United States, or for the use and benefit of the United States through an agent or instrumentality of the United States, all of which such sales are immune from taxation by the State of Alabama under the Constitution of the United States and the Statutes of Alabama for the reason that said assessment was of or on account of sales made to the United States, or to the agents or instrumentalities of the United States on and for the behalf of the United States exclusively.

7. The assessment of May 15, 1941, above mentioned is illegal and void for the reason that said assessment is based upon sales made to the United States, the taxation of which by the State of Alabama is violative of the Constitution of the United States.

King & Boozer, a Partnership Composed of Tom Cobb King and Simon Elbert Boozer, by (Signed) Tom Cobb King, Partner.

BEFORE STATE DEPARTMENT OF REVENUE, MONTGOMERY,
ALABAMA

MINUTE ENTRY, FINAL ASSESSMENT.

STATE OF ALABAMA

vs.

KING & BOOZER, a Partnership Composed of Tom Cobb King and Simon Elbert Boozer, Taxpayer.

Whereas, on the 15th day of May, 1941, an assessment was made by the State Department of Revenue against King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, of Anniston, Calhoun County, Alabama, hereinafter called Taxpayer, under and in accordance with the provisions of the Alabama Sales Tax Act, (Act No. 18 of the General Acts of Alabama of 1939, approved February 8, 1939) for sales tax in the amount of One Thousand Two Hundred Thirty-six & 71/100 Dollars (\$1,236.71) tax, plus One Hundred Twenty-three & 67/100 Dollars (\$123.67) penalty thereon, together with interest upon the amount of said tax at the rate of one-half of one per cent per month, or any fraction thereof, from April 20, 1941, the date the

same became due and payable under the provisions of said [fol. 14] Act for the period January 1, 1941, through March 31, 1941; and

Whereas, said Taxpayer having expressly waived in writing any and all notice as required by law for the hearing of said assessment, and having consented in writing to a final hearing thereon forthwith on this the 15th day of May, 1941; and

Whereas, said Taxpayer having appeared on this day in person and by attorney and filed a protest in writing as to the legal liability for said deficiency tax claimed to be due by said Taxpayer under said Act for said period; and

Whereas, it appearing that said deficiency assessment as made is correct and should be made final;

It Is, Therefore, Ordered that said deficiency assessment be and the same is hereby made final, and that execution be issued therefor.

Dated this the 15th day of May, 1941.

State Department of Revenue, by (Signed) John C. Curry, Commissioner of Revenue; (Signed) Julia Klinge, Secretary.

NOTICE OF FINAL ASSESSMENT

To King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, Anniston, Calhoun County, Alabama, Taxpayer.

Notice is hereby given that upon a hearing before the State Department of Revenue, held on this date pursuant to written consent filed by you, the State Department of Revenue, made final as assessment against you in the amount of Twelve Hundred Thirty-six & 71/100 Dollars (\$1,236.71), tax, plus One hundred twenty-three & 67/100 Dollars (\$123.67) penalty thereon, due by you under the provisions of the Alabama Sales Tax Act (Act No. 18, H. 82, approved February 8, 1939), for the period:

January 1, 1941 through March 31, 1941, and unless the amount of said assessment, together with interest upon the amount of said tax from the date the same became due and payable under said Act (which in the aggregate amounts to

Thirteen hundred seventy-two and 75/100 Dollars (\$1,372.75), to the date of this Notice), is paid, or appeal therefrom is taken, as provided by law, within fifteen days [fols. 15-17] from this date, as execution therefor may be issued by the Department.

In Witness Whereof, the State Department of Revenue, acting by and through John C. Curry, as Commissioner of Revenue, hereunto sets its name and official seal, this the 15th day of May, 1941.

State Department of Revenue, (Signed) John C. Curry, Commissioner of Revenue; (Signed) Julia Klinge, Secretary.

We acknowledge receipt of a copy of the foregoing notice.
May 15, 1941.

King & Boozer, by Tom Cobb King, Partner.

Notice of Appeal omitted. Printed side page 2 ante.

[fol. 18] Secretary's Certificate to foregoing transcript omitted in printing.

[fol. 19] BEFORE STATE DEPARTMENT OF REVENUE

State of Alabama,

SALES TAX RETURN

Required by House Bill 82, Approved Feb. 8, 1939. For the Period Beginning Jan. 1, 1941, and Ending March 31, 1941.

King and Boozer	Account No.	Name:
Formerly the below Co.	8 1176	King and Boozer
King Metal Products,	8 1176	St. Address:
Box 788, Anniston, Ala.		Box #788,
		Anniston, Ala.,
		County, Calhoun.

State Kind and Class of Business:
Iron-Steel-Lumber Mfg.

Computation of the Tax.

1. (a) Total Gross sales (both cash and credit) for period covered by this report, ex- cept sales of automotive vehicles (Tax- payers other than sellers of tangible personal property report gross re- ceipts	\$113,584.94
3. (a) Sales made at wholesale (cash and credit) (see wholesale sales reverse side)	
(b) Less taxable retail credit sales during period not collected	\$39,075.83
(g) Sales in interstate commerce	\$70,134.30
[fol. 20] (h) Sales to U. S. Gov., State of Ala., Counties and incorporated cities and towns within Ala.	\$3,553.98
4. Total Deductions (Total of item 3)	\$112,764.11
5. Total amount remaining as measure of tax (2 minus 4)	820.83
6. Amount of tax (Equal to 2% of item 5)	16.42
17. Total due for which remittance is attached	16.42

This 19 day of April, 1941.

King and Boozer, Signature, T. C. King.

Secretary's Certificate to foregoing paper omitted in
printing.

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

WITHDRAWAL OF APPEARANCE OF THOMAS D. SAMFORD—Filed
May 29, 1941

By leave of Court first had and obtained, comes Thos. D.
Samford and withdraws his appearance as attorney for
appellants King & Boozer, a partnership composed of Tom
Cobb King and Simon Elbert Boozer, in the above styled
cause.

Thomas D. Samford.

[fol. 21] IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

PETITION OF UNITED STATES FOR LEAVE TO INTERVENE—Filed
May 29, 1941

Comes now the United States of America, a corporation sovereign and body politic, by Thomas D. Samford, United States Attorney for the Middle District of Alabama, and moves the Court for leave to intervene in the above styled statutory appeal from a final assessment made by the State Department of Revenue of the State of Alabama against the appellant for sales taxes for the period January 1, 1941, through March 31, 1941, both inclusive, being dated May 15, 1941, and made pursuant to the provisions of the Alabama Sales Tax Act, Act No. 18, House Bill 82, approved February 8, 1939, and as grounds for such intervention respectfully represents to the Court as follows:

1. The assessment of May 15, 1941, above mentioned, and which is assailed herein, is based upon sales made by the appellant of tangible personal property to Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership, for the use and consumption by said partnership in and about the performance by it of a contract entered into by it with the United States for the construction of a complete tent camp and other military facilities for the United States at Camp McClellan, in the State of Alabama. Said contract provides that the cost of performing and executing the same, including the purchase of all materials necessary therefor and the amount of any applicable and valid taxes, shall be assumed and borne by the United States and reimbursement therefor made by the United States to the aforesaid partnership. The United States, therefore, is directly and immediately affected by the assessment of May 15, 1941, the validity of which is assailed in this appeal and is a necessary and proper party to these proceedings.

2. The assessment of May 15, 1941, above mentioned and which is assailed herein is based upon the sales by the appellant of tangible personal property to the United States or to the United States through Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership consisting of Dunn Construction Company, Inc., and

John S. Hodgson and Company, one of its agencies and instrumentalities, which are immune from taxation by the State of Alabama under the Constitution of the United States of America.

3. The assessment of May 15, 1941, above mentioned and which is assailed herein as illegal and void, is based upon [fol. 22] sales of tangible personal property by the appellant to the United States which are immune and exempt from taxation by the State of Alabama under the Constitution of the United States of America and the Statutes of Alabama.

4. The assessment of May 15, 1941, above mentioned and which is assailed herein, is illegal and void for the reason that said assessment was made upon sales of tangible personal property expressly exempt from taxation under subsection (a) of Section V of Act No. 18 of the Legislature of Alabama, Session of 1939, as approved February 8, 1939, as it appears in General Acts of Alabama, Regular and Special Session of 1939, at pages 16, 18.

5. The assessment of May 15, 1941, above mentioned and which is assailed herein, is illegal and void for the reason that said assessment was made upon sales of tangible personal property to an agency or instrumentality of the United States on or for the account of the United States exclusively, and immune from taxation under the Constitution of the United States of America and the Statutes of Alabama.

6. The assessment of May 15, 1941, above mentioned and which is assailed herein, is illegal and void for the reason that said assessment was made upon or with respect to sales of intangible personal property purchased by the United States, or for the use and benefit of the United States through an agent or instrumentality of the United States, all of which such sales are immune from taxation by the State of Alabama under the Constitution of the United States of America and the Statutes of Alabama.

7. The assessment of May 15, 1941, above mentioned and which is assailed herein, is illegal and void for the reason that said assessment was based upon sales made to the United States, the taxation of which by the State of Alabama is violative of the Constitution of the United States of America.

8. The sales of tangible personal property upon which the assessment of May 15, 1941, above mentioned is based were sales to the United States, or to Dunn Construction Company and John S. Hodgson & Company, a partnership, for or on behalf of the United States, which sales were consummated at Camp McClellan, Anniston, Alabama, which is within an area over which the United States has exclusive jurisdiction, and having been made upon said Federal area said sales are immune from taxation by the State of Alabama under the Constitution of the United States. The assessment of May 15, 1941, is therefore illegal, contrary to law, and null and void.

9. The Alabama Sales Tax Act, Act No. 18, House Bill 82, approved February 8, 1939, when applied to sales to or purchases by the United States or its agencies and instrumentalities is violative of the Constitution of the United [fol. 23] States of America and void.

10. The provision of the Alabama Sales Tax Act, Act No. 18, House Bill 82, approved February 8, 1939, in requiring the appellant to collect the tax imposed thereunder from its vendee, the partnership consisting of Dunn Construction Company, Inc., and John S. Hodgson and Company, and the provisions of the contract aforesaid, between the United States and the partnership aforesaid, requiring the United States to reimburse said partnership for the cost of performing and executing the same, including the purchase price of materials necessary therefor, and the amount of any applicable and valid taxes incurred by it in the performance of said contract, constitutes the United States a real party in interest to the assessment of May 15, 1941, which is assailed herein and a proper party intervener to this appeal.

Respectfully submitted, United States of America, by
Thomas D. Samford, United States Attorney, and
by Hartwell Davis, Asst. United States Attorney.

[File endorsement omitted.]

Refiled in open Court by leave of Court as the Petition of Intervention of the United States of America, as Intervenor.
United States of America, by Thomas D. Samford,
United States Attorney, and by Hartwell Davis,
Asst. United States Attorney.

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

EXCEPTIONS AND MOTION TO STRIKE PETITION FOR LEAVE TO
INTERVENE—Filed May 29, 1941

Comes the State of Alabama, Appellee in the above stated cause, and objects to the granting of leave on behalf of the United States of America to intervene in said cause, as prayed for in petition for leave to intervene filed by the United States of America in this cause on the 29 day of May, 1941, and for grounds of such objection assigns, separately and severally, the following:

1. It is not shown thereby that the United States of America is a necessary or proper party in this cause.
2. Said petition fails to set forth sufficient facts to show any right or necessity on behalf of the United States of America to intervene.
3. For that it appears from said petition that the United States of America expressly consented to and agreed to the payment of said tax by the contractor, and to reimburse said contractor therefor.
4. There is no equity in said petition.
5. That the said petition states no grounds or cause for intervention in said cause by the United States.
6. It affirmatively appears from said petition that the assessment is based upon sales made by the Appellant to Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership, as contractors, in a joint-venture, for the use and consumption by said contractors, and not to the United States or any agency or instrumentality thereof.
7. For that it appears from said petition that the United States had agreed and assumed to bear the amount of any applicable and valid taxes, and to reimburse said contractors therefor.
8. For that it appears the allegation that the assessment of May 15, 1941, is based upon the sales by the Appellant of tangible personal property to the United States or to the United States through Dunn Construction Company,

Inc., and John S. Hodgson and Company, a partnership, one of its agencies and instrumentalities, is a mere conclusion of the pleader, and is unsupported by any fact or facts set forth in said petition.

9. The allegation that said Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership consisting of Dunn Construction Company, Inc., and John S. Hodgson and Company, are immune from taxation by the State of Alabama under the Constitution of the United States, is a mere conclusion of the pleader and is unsupported by any fact or facts set forth in said petition.

10. For that said allegation that the assessment of May 15, 1941, is based upon sales of tangible personal property by the Appellant to the United States, is inconsistent with and contrary to said allegation in the petition to the effect that said sales were made to said contractors with the United States, and is a mere conclusion of the pleader, unsupported by any fact or facts set forth in said petition.

11. For that it is not shown that said contractors, namely, Dunn Construction Company, Inc., and John S. Hodgson and Company, referred to in said petition as a partnership, are any agency or instrumentality, or agencies or instrumentalities of the United States, and exempt from taxation by the State of Alabama.

12. For that it is not shown that the United States will be directly or indirectly affected or injured by the judgment of the Court in this cause.

13. For that it affirmatively appears that said sales of tangible personal property were made to independent contractors with the United States and not to any agency or instrumentality of said Government.

14. For that said petition attempts to attack therein the validity of said assessment, and fails to show or allege wherein or for what reason the United States of America has such an interest in the decision of said cause as to allow it to intervene herein.

15. For that said petition attempts and purports to try and determine the validity of said assessment in said petition, to the exclusion of said Appellant in said cause.

16. For that it does not appear that said contractors, namely, Dunn Construction Company, Inc., and John S.

Hodgson and Company, are objecting to or protesting the payment of said assessment made against the Appellant in this cause.

17. For that it appears from said petition that the interests of the Appellant and the United States in said cause are adverse to one another.

18. For that it does not appear that the United States made or filed objection or objections with the State Department of Revenue of Alabama to the making of the assessment against the Appellant.

19. For that it does not appear that the Appellant has consented to or is willing for the United States to intervene in its behalf in said cause.

20. For that it appears that if said assessment is invalid and unconstitutional and a direct burden upon the United States, the United States will not be bound thereby and will not be obligated to reimburse said contractors for the amount or amounts expended by them in payment of such invalid or unconstitutional taxes or assessment.

21. For that it is not alleged or shown in said petition that the United States has an interest in the matter of litigation, or in the success of either of the parties to said cause, or an interest against both of said parties.

22. For that it does not appear that the United States filed this petition to intervene before the trial in this Court.

23. For that it does not appear that the United States [fol. 26] intervened or filed a petition to do so before the State Department of Revenue on the hearing of the assessment made in this cause.

24. For that said petition is not made by complaint and does not set forth the ground upon which the interests of the United States are based.

25. For that it is not alleged that the United States is obligated by contract or otherwise to pay to the State of Alabama or the Appellant or said contractors the assessment made against the Appellant in this cause.

26. For that it appears that the interest of the United States in this cause, if any, is remote and consequential, and is not in issue in this cause.

And Appellee separately moves to strike the petition from the file in this cause, and for grounds of said motion assigns, separately and severally, the following:

1. It assigns, separately and severally, each of the grounds assigned by it hereinabove in its objection to said petition or to the granting of leave to the United States of America to intervene in this cause.

Thomas S. Lawson, Attorney General of the State of Alabama; John W. Lapsley, Assistant Attorney General of the State of Alabama; J. Edward Thornton, Assistant Attorney General of the State of Alabama.

[File endorsement omitted.]

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

ORDER PERMITTING THE UNITED STATES OF AMERICA TO INTER-
VENE—Filed May 29, 1941

This cause came on this day to be heard on the petition of the United States of America, a corporation sovereign and body politic, by its attorney, Thomas D. Samford, United States Attorney for the Middle District of Alabama, and filed its petition for leave of this Court to intervene herein.

Upon consideration thereof it is adjudged, ordered and decreed that the United States be, and it hereby is, granted [fol. 27] leave to appear herein as a party intervener.

Done this May 29, 1941.

Jones, Judge.

[File endorsement omitted.]

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

DEMURRER AND ANSWER TO PETITION OF INTERVENTION—
May 29, 1941

Comes the State of Alabama, Appellee in the above styled cause, and for answer to the Petition for Intervention, filed

in this cause, by the United States, as Intervener, makes the following defenses:

First Defense

Demurrer

Comes the State of Alabama, Appellee in said cause and demurs to said Petition of the United States, as Intervener, filed in this cause, and for grounds of said demurrers assigns, separately and severally, the following:

1. There is no equity in said petition.
2. It is not shown thereby that the United States of America is a necessary or proper party in this cause.
3. Said petition fails to set forth sufficient facts to show any right or necessity on behalf of the United States of America to intervene in the above stated cause.
4. For that it appears from said petition that the United States of America expressly consented to and agreed to the payment of said tax by the contractor, and to reimburse said contractor therefor.
5. That the said petition states no grounds or cause for intervention in said cause by the United States.
6. It affirmatively appears from said petition that the assessment is based upon sales made by the Appellant to Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership, as contractors, in a joint-venture, for the use and consumption by said contractors, [fol. 28] and not to the United States or an agency or instrumentality thereof.
7. For that it appears from said petition that the United States had agreed and assumed to bear the amount of any applicable and valid taxes, and to reimburse said contractors therefor.
8. For that the allegation that the assessment of May 15, 1941, is based upon the sales by the Appellant of tangible personal property to the United States or to the United States through Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership, one of its agencies and instrumentalities, is a mere conclusion of the pleader, and is unsupported by any fact or facts set forth in said petition.

9. The allegation that said Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership consisting of Dunn Construction Company, Inc., and John S. Hodgson and Company, are immune from taxation by the State of Alabama under the Constitution of the United States, is a mere conclusion of the pleader and is unsupported by any fact or facts set forth in said petition.

10. For that said allegation that the assessment of May 15, 1941, is based upon sales of tangible personal property by the Appellant to the United States, is inconsistent with and contrary to said allegation in the petition to the effect that said sales were made to said contractors with the United States, and is a mere conclusion of the pleader, unsupported by any fact or facts set forth in said petition.

11. For that it is not shown that said contractors, namely, Dunn Construction Company, Inc., and John S. Hodgson and Company, referred to in said petition as a partnership, are an agency or instrumentality, or agencies or instrumentalities of the United States, and exempt from taxation by the State of Alabama.

12. For that it is not shown that the United States will be directly or indirectly affected or injured by the judgment of the Court in this cause.

13. For that it affirmatively appears that said sales of tangible personal property were made to independent contractors with the United States and not to any agency or instrumentality of said Government.

14. For that said petition attempts to attack therein the validity of said assessment, and fails to show or allege wherein or for what reason the United States of America has such an interest in the decision of said cause as to allow it to intervene herein.

15. For that said petition attempts and purports to try and determine the validity of said assessment in said petition, to the exclusion of said Appellant in said cause.

[fol. 29] 16. For that it does not appear that said contractors, namely, Dunn Construction Company, Inc., and John S. Hodgson and Company, are objecting to or protesting the payment of said assessment made against the Appellant in this cause.

17. For that it appears from said petition that the interests of the Appellant and the United States in said cause are adverse to one another.

18. For that it does not appear that the United States made or filed objection or objections with the State Department of Revenue of Alabama to the making of the assessment against the Appellant.

19. For that it does not appear that the Appellant has consented to or is willing for the United States to intervene in its behalf in said cause.

20. For that it appears that the interest of the United States in this cause, if any, is remote and consequential, and is not in issue in this cause.

Second Defense

As and for a second defense to said petition and without waiving the demurrers separately and severally interposed by the Appellee and incorporated hereinabove, but insisting thereon, the Appellee, State of Alabama, in answer to said petition says:

1. In answer to paragraph numbered 1, the Appellee admits that the assessment of May 15, 1941 is based upon sales made by the Appellant of tangible personal property to Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership, for the use and consumption by said contractors in and about the performance by it of a contract entered by it with the United States for the construction of a complete tent camp and other military facilities for the United States at Camp McClellan in the State of Alabama. The Appellee avers that the sales which were the basis of the assessment in this cause were begun and fully consummated and completed, including the payment to the Appellant by Dunn Construction Company, Inc., and John S. Hodgson and Company of the sales price thereof, during the period from January 1, 1941 to March 31, 1941.

The Appellee denies that the cost of performing and executing said contract, including the purchase of all materials necessary therefor and the amount of any applicable and valid taxes, was agreed to be assumed and borne by the United States, but it admits that the United States agreed to reimburse said contractors therefor. Appellee

avers that the only and sole responsibility to the seller of [fol. 30] said material for the price thereof and any sales tax thereon or an amount equal thereto is upon said contractors as the purchasers of said material; and that the United States is under no liability for or to the State of Alabama or to the Seller of said material for the sale price thereof or any sales tax thereon; that the United States by express provision in its contract with said contractors relieved itself of all liability to any vendor for or on account of any purchases made by said contractors, Dunn Construction Company, Inc., and John S. Hodgson and Company in the performance of said contract; and that the only responsibility or liability of the United States by reason of or on account of said purchases of materials that were made by said contractors is to said contractors themselves, under and by virtue of said contract with said contractors. And the Appellant avers that the United States is not now nor has it been obligated or under any liability to the Appellant in this cause or the State of Alabama for or on account of the sales made by the Appellant of tangible personal property to said contractors; and that said assessment of May 15, 1941 is based upon said sales. And the Appellee avers that the United States is not now nor has it been liable or obligated to the State of Alabama or the Appellant in this cause for or by reason of said assessment of May 15, 1941.

The Appellee denies that the United States is directly and immediately affected by said assessment of May 15, 1941, the validity of which is assailed on this appeal. And the Appellee avers that the United States has no interest in nor is affected by said assessment, and that the United States is not a necessary, indispensable, or proper party to these proceedings. The Appellee further avers that, in any event, the United States by said contract with said contractors waived any immunity that exists or may have existed, in this, that it consented to the imposition of any and all taxes that may be levied upon or with respect to the purchase of materials by said contractor.

2. In answer to paragraph numbered 2, the Appellee denies that the assessment of May 15, 1941, is based upon sales by the Appellant of tangible personal property to the United States or to the United States through Dunn Construction Company, Inc., and John S. Hodgson and Company; and Appellee avers that said sales were directly

made to said Dunn Construction Company, Inc., and John S. Hodgson and Company as independent contractors with the United States and not to the United States or for the use or account of the United States. And the Appellee avers that said contractors at the time of said purchases were not an agency or instrumentality of the United States, and that said contractors were, as purchasers and consumers of such material or tangible personal property, subject [fol. 31] to the provisions of the Alabama Sales Tax Act, and to the payment of said tax or the amount thereof to the seller of such property.

3. In answer to paragraph numbered 3, the Appellee denies that the assessment of May 15, 1941, is based upon sales of tangible personal property by the Appellant to the United States; and avers that said sales were made to said contractors composed of Dunn Construction Company, Inc., and John S. Hodgson and Company, and upon the sole credit of said contractors, and that said sales are not immune or exempt from taxation by the State of Alabama under the Constitution of the United States or the Statutes of Alabama.

4. In answer to paragraph numbered 4, the Appellee denies that the said assessment of May 15, 1941, is illegal and void for the reason that said assessment was made upon sales of tangible personal property expressly exempt from taxation under Sub-section (a) of Section V of Act No. 18 of the Legislature of Alabama, approved February 8, 1939; and Appellee avers that said assessment is legal and valid and that said sales are not exempt by said Act as alleged in said paragraph.

5. In answer to paragraph numbered 5, the Appellee denies that said assessment of May 15, 1941, is illegal and void for the reason that said assessment was made upon sales of tangible personal property to an agency or instrumentality of the United States on or for the account of the United States exclusively; and the Appellee avers that said sales were made to an independent contractor which was not an agency or instrumentality of the United States, nor were such purchases made for or on account of the United States.

6. In answer to paragraph numbered 6, the Appellee denies that the assessment of May 15, 1941 is illegal and void

for the reason that said assessment was made upon or with respect to sales of tangible personal property purchased by the United States, or for the use and benefit of the United States through an agent or instrumentality of the United States; and the Appellee avers that said assessment was made upon or with respect to sales of tangible personal property to an independent contractor or contractors with the United States for the use by such contractor or contractors in the performance by them of construction or building work within the State of Alabama; and the Appellee further avers that the imposition of said levy is not a direct or immediate burden upon the United States or the performance of its functions or activities; and that said assessment is legal and valid and such sales are subject to taxation by the State of Alabama.

7. In answer to paragraph numbered 7, the Appellee denies that the assessment of May 15, 1941 is illegal and void [fol. 32] for the reason that said assessment was based upon sales made to the United States. On the contrary, the Appellee avers that said sales were made to an independent contractor with the United States, and not to the United States or an agency or instrumentality thereof or for its use or benefit. The Appellee further avers that the taxation of said sales by the State of Alabama is not in violation of the Constitution of the United States of America.

8. In answer to paragraph numbered 8, the Appellee denies that the sales of tangible personal property upon which the assessment of May 15, 1941, is based, were sales to the United States, or to Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership, for or on behalf of the United States. On the contrary, the Appellee avers that said sales were made directly to said contractors, for and on behalf of said contractors and not the United States of America, and that said contractors, during the period in which said sales were made, were independent contractors with the United States, and took title to and all interest and right in said tangible personal property in their own names and for and on behalf of themselves and not the United States of America, and that during said period said contractors were not an agency or instrumentality of the United States.

The Appellee denies that said sales were consummated at Camp McClellan, Anniston, Alabama; and further denies

that said Camp McClellan is an area over which the United States has exclusive jurisdiction. The Appellee avers that said sales were made and consummated at the place of business of said partnership of King and Boozer within the State of Alabama, and at a point not upon or within said Camp McClellan and not at a point upon or within an area over which the United States has or had at said time exclusive jurisdiction. The Appellee avers that delivery of said tangible personal property and the passage of title thereto took place within the State of Alabama at the place of business of said King and Boozer, and not upon or within an area over which the United States had or has exclusive jurisdiction. The Appellee avers that in any event said assessment was made as the levy of a license or privilege tax upon said King and Boozer for the privilege of engaging within this State in the business of selling at retail tangible personal property, and that even if the transfer of title or consummation of said sales took place within or upon an area over which the United States has exclusive jurisdiction, said assessment is *avlid* and legal in all respects and the State of Alabama possesses the jurisdiction and power to make the same.

9. In answer to paragraph numbered 9, the Appellee denies that the Alabama Sales Tax Act applies to direct sales [fol. 33] to or direct purchases by the United States or such of its instrumentalities or agencies as are created and controlled by it and which are entitled to deferral immunity from taxation; but Appellee avers that the Alabama Sales Tax Act as applied in this cause is valid and legal in all respects and is not in violation of the Constitution of the United States, nor does it constitute a direct or prohibited burden upon said sovereign or its activities or functions.

10. In answer to paragraph numbered 10, the Appellee denies that the United States is a real party in interest to the assessment of May 15, 1941, because of the fact that the Alabama Sales Tax Act compels the Appellant, King and Boozer, to collect the tax imposed upon it from its vendee, said contractors, namely, Dunn Construction Company, Inc., and John S. Hodgson and Company, or the fact that the provisions of the contract between the United States and said contractors, Dunn Construction Company, Inc., and John S. Hodgson and Company, require the United States to reimburse said vendee for the amount of said tax as a part of the

cost of the construction provided for in said contract. The Appellee avers that the interest of the United States in this cause is remote and its liability for reimbursement under the provisions of said contract was duly authorized and is binding upon it as a contractual liability to said contractors, and that it is not a real party in interest to said assessment nor is it *aa* necessary or proper party to this cause.

And now having fully answered said petition, Appellee prays that it may be hence dismissed with its reasonable costs in this behalf expended.

Thomas S. Lawson, Attorney General of the State of Alabama; John W. Lapsley, Assistant Attorney General; J. Edward Thornton, Assistant Attorney General; Solicitors for Appellee, State of Alabama.

[File endorsement omitted.]

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

PETITION OR BILL OF COMPLAINT—Filed May 29, 1941

To the Honorable Walter B. Jones, Judge of Said Court:

[fol. 34] Comes King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, Appellant in the above stated cause, and represents and shows unto Your Honor as follows:

1. That Appellant, King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, both of whom are over the age of twenty-one years and reside in Calhoun County in the State of Alabama; and that the Appellee in said cause is the State of Alabama.

2. That during the period from January 1, 1941, to March 31, 1941, Appellant, under said name of King & Boozer, was engaged in the manufacture and prefabrication of lumber and in the manufacture of portable or prefabricated houses, all of which were sold by Appellant in large quantities to purchasers buying in large quantities, chiefly the Federal Government, its departments and agencies.

3. That on, to-wit, the 15th day of May, 1941, the State Department of Revenue of the State of Alabama made and entered a deficiency assessment of sales tax against Appellant in the amount of \$1,236.71 tax, plus \$123.67 penalty thereon, together with interest upon the amount of said tax at the rate of one-half of one per cent per month, or any fraction thereof; from, to-wit, the 20th day of April, 1941, notice of which assessment and the demand for the payment thereof and of the date of the hearing of said assessment before said Department was waived by Appellant. That thereafter on said date, namely, the 15th day of May, 1941, Appellant appeared in person and by counsel and filed a protest against said assessment and the validity thereof. That thereupon on said date, upon a hearing of said protest, said protest was overruled and said assessment was made final, notice of which was given to and accepted by Appellant on May 15, 1941. That thereupon on May 16, 1941, Appellant, pursuant to the provisions of the Alabama Sales Tax Act, Act No. 18, approved February 8, 1939 (General Acts, Regular Session, 1939, p. 16), and Act No. 154, approved April 21, 1936 (General Acts, Extra Session, 1936, p. 172), filed in this Court a notice of appeal from said final assessment, and a copy of such notice of appeal was on said date filed with the State Department of Revenue, and in connection with said appeal, Appellant filed a supersedeas bond, as required by the provisions of said Act No. 154, which bond was duly approved by the Register of this Court, a certified copy of all of which proceedings before said State Department of Revenue, duly certified by Julia Klinge, Secretary of the State Department of Revenue, is on file in this Court.

3. Appellant alleges:

(a) That the assessment of May 15, 1941, was based upon the sales price of tangible personal property consisting of [fol. 35] lumber purchased by the United States or a partnership composed of Dunn Construction Company, Inc., and John S. Hodgson and Company, trading as Dunn Construction Company, Inc., and John S. Hodgson and Company, as an agent and instrumentality of the United States and in connection with the performance by the partnership of its contract with the United States, a copy of which is attached hereto, marked Exhibit A, and prayed to be read as a part hereof as if set out fully herein. Said contract

provides that the cost of performing and executing the same, including the purchase of all materials necessary therefor and the amount of any applicable and valid taxes, shall be assumed and borne by the United States of America and reimbursement therefore made by the United States to said partnership. The said personal property was purchased for use in and about the above mentioned construction, by the United States or by the aforesaid partnership as an agent and instrumentality of the United States and for an on behalf of the United States, at Camp McClellan, near Anniston, Alabama, of certain buildings, warehouses, and other camp and military facilities under the aforesaid contract. The purchases of the aforesaid partnership in connection with the performance of the said contract are immune from taxation by the State of Alabama under the Constitution of the United States of America fully as much as the purchases of the United States itself and are therefore immune under the Constitution of the United States of America from the tax imposed by Act No. 18 of the Legislature of Alabama, Session of 1939, as approved February 8, 1939, as it appears in General Acts of Alabama, Regular and Special Session of 1939, at page 16. The assessment of May 15, 1941, is therefore illegal, contrary to law, and null and void.

(b) That the sales of tangible personal property upon which the assessment of May 15, 1941, above mentioned is based were sales to the United States or to agents and instrumentalities of the United States for and on behalf of the United States, the taxation of which by the State of Alabama is taxation of the United States by the State of Alabama which is prohibited by and violative of the Constitution of the United States. The assessment of May 15, 1941, is therefore illegal, contrary to law, and null and void.

(c) That the sales of tangible personal property upon which the assessment of May 15, 1941, is based were sales to the United States or to agents and instrumentalities of the United States who purchased for and on behalf of the United States exclusively and are immune from taxation by the State of Alabama under the Constitution of the United States. The assessment of May 15, 1941, is therefore illegal, contrary to law, and null and void.

[fol. 36] (d) That the sales of tangible personal property upon which the assessment of May 15, 1941, above mentioned

is based were sales to the United States, or to agents and instrumentalities of the United States for and on behalf of the United States, and exempt from the tax imposed by Act No. 18 of the General Acts of Alabama, Regular Session, 1939, under subsection (a) of Section V of that Act. The assessment of May 15, 1941, is therefore illegal, contrary to law, and null and void.

(e) That the State Department of Revenue in applying the provisions of Act No. 18 of the General Acts of Alabama, Regular Session, 1939, p. 16, to sales to the United States, or to the agents and instrumentalities of the United States for or on behalf of the United States, have applied the provisions of that Act in a manner which renders the said Act invalid and void under the Constitution of the United States. The assessment of May 15, 1941, is therefore illegal, contrary to law, and null and void.

(f) That the sales of tangible personal property which the assessment of May 15, 1941, above mentioned is based were sales to the United States but for or on behalf of the United States consummated at Camp McClellan, Anniston, Alabama, which is within an area within the exclusive jurisdiction of the United States and having been made upon said Federal area are immune from taxation by the State of Alabama under the Constitution of the United States. The assessment of May 15, 1941, is therefore illegal, contrary to law, and null and void.

(g) That the enactment of Act No. 18 of the Legislature of Alabama, Session of 1939, as approved February 8, 1939, as it appears in General Acts of Alabama, Regular and Special Session of 1939 at page 16, in so far as it authorizes the assessment of May 15, 1941, and subjects to taxation sales of tangible personal property to the United States or to the agents or instrumentalities of the United States for or on behalf of the United States is invalid and void because violative of the Constitution of the United States.

4. Appellant further alleges:

(a) That Appellant has presented to the partnership composed of Dunn Construction Company, Inc., and John S. Hodgson and Company a bill for the taxes or for a sum equal in amount to said taxes which were assessed against Appellant as aforesaid in paragraph 3, but which taxes have not been paid.

The Premises Considered, Appellant prays Your Honor as follows:

1. That upon the final hearing of this cause, a decree be entered herein adjudging and decreeing said assessment to be illegal, contrary to law, and null and void, and that the [fol. 37] same be in all things cancelled and annulled.

2. That Appellant be granted all such other, further or different relief as the nature of this cause may require.

Knox, Liles, Jones & Blackmon, Fred L. Blackmon,
Solicitors for King & Boozer, a Partnership Com-
posed of Tom Cobb King and Simon Elbert Boozer.

NOTE.—Transcript of Exhibit "A" attached the above Bill of Complaint will be found on page 27 et seq. herein.

[File endorsement omitted.]

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

DEMURRER AND ANSWER TO BILL OF COMPLAINT—Filed May
29, 1941

Comes the State of Alabama, Appellee in said cause, and for answer to the Bill filed by Appellant in this cause makes the following defenses:

First Defense

Demurrer

Comes the State of Alabama, Appellee in said cause, and demurs to the Bill filed by the Appellant in this cause, and for grounds of such demurrer assigns, separately and severally, the following:

1. There is no equity in the Bill.
2. Said Bill fails to set out facts sufficient to entitle the Appellant to the relief prayed for herein.
3. Said Bill fails to allege sufficient facts to show that the assessment of such tax was illegal.

4. Said Bill fails to allege sufficient facts to show that said tax was illegally levied or assessed against or collected from the Appellant.

5. Said Bill fails to allege sufficient facts to show that the tangible personal property sold at retail by the Appellant [fol. 38] was exempt from the provisions of the said Alabama sales tax Act, or from the tax assessed with respect thereto under said Act.

6. Said Bill fails to aver sufficient facts to show that said Appellant was or is immune from the tax alleged to have been levied or assessed against said Appellant.

7. The facts set forth in said Bill are insufficient to show that the said vendee or vendees of the said sales of tangible personal property viz., Dunn Construction Company, Inc., and John S. Hodgson and Company, partners or co-venturers, were such an agency or instrumentality of the United States as would entitle it or them to assert or claim any immunity from the tax or assessment alleged to have been levied or assessed against the Appellant.

8. For that the facts alleged in said Bill show that the Appellant, namely, King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, was legally liable for the assessment against it of said tax, together with penalty and interest thereon.

9. For that the facts alleged in said Bill show that the United States of America consented to the imposition of the tax therein alleged to have been assessed against and paid by said vendee or vendees.

10. For that the facts alleged in said Bill show that the United States, in and by the terms of said contract therein mentioned, waived any immunity from said tax mentioned in said Bill with respect to the sale to or purchase by said vendee or vendees, namely, Dunn Construction Company, Inc., and John S. Hodgson and Company, partners or co-venturers.

11. For that the facts alleged in said Bill show that the United States in and by said contract between it and the said Dunn Construction Company, Inc., and John S. Hodgson and Company, partners or co-venturers, consented or agreed to permit the levy or imposition of said sales tax

upon said Appellant for and by reason of said sales by it to said Dunn Construction Company, Inc., and John S. Hodgson and Company, partners or co-venturers.

12. For that the facts alleged in said Bill show that the United States, in and by said contract between it and said Dunn Construction Company, Inc., and John S. Hodgson and Company, partners or co-venturers, consented or agreed to the imposition or levying upon said Appellant of said sales tax by reason of said sales by Appellant to said Dunn Construction Company, Inc., and John S. Hodgson and Company, partners or co-venturers, in this, that the United States agreed and obligated itself in said contract to reimburse said Dunn Construction Company, Inc., and John S. Hodgson and Company, partners or co-venturers, for the [fol. 29] amount of all taxes imposed upon them or the sale to them of materials for use in the construction of said project at Fort McClellan, Alabama.

13. For that said Bill is repugnant in its averments and in the relief prayed for in this: it avers that said vendee or vendees, Dunn Construction Company, Inc., and John S. Hodgson and Company, partners or co-venturers, were immune from the payment of said tax to the Appellant, yet shows that the payment thereof was expressly consented and agreed to by said vendee or vendees and the United States of America.

14. For that the averments in said Bill to the effect that Dunn Construction Company, Inc., and John S. Hodgson and Company are agents or instrumentalities of the United States in the performance of said contract with the United States, are mere conclusions of the pleader, unsupported by the allegations of fact contained in said petition.

15. For that it appears from the facts alleged in said Bill that the United States expressly consented to the payment of said tax by the Appellant, and to the passing of said tax or an amount equal thereto by the Appellant to its contractor, Dunn Construction Company, Inc., and John S. Hodgson and Company, partners and co-venturers.

16. For that it appears that the United States has expressly consented to the levying, assessment, and payment of the taxes herein mentioned; or that it has expressly consented to reimburse its contractor for the amount expended by it in payment of said taxes.

17. For that the averments in said Bill to the effect that the transactions therein mentioned were immune from taxation by the State of Alabama are alleged as mere conclusions of the pleader, unsupported by the facts therein alleged.

18. For that said Bill fails to show wherein said taxes are invalid or illegally assessed against the Appellant.

19. For that the facts alleged in said Bill show that the Appellant therein mentioned is legally liable for said taxes and the penalty and interest thereon.

20. For that the facts alleged in said Bill show said tax was legally assessed against said Appellant under and pursuant to the provisions of said contract between the United States and Dunn Construction Company, Inc., and John S. Hodgson and Company, partners and co-venturers.

Second Defense

As and for a second defense to said Bill, and without waiving the demurrers separately and severally interposed [fol. 40] by Appellee and incorporated hereinabove, but insisting thereon, the Appellee, State of Alabama, in answer to said Bill says as follows:

1. The allegations of paragraph numbered 1 are admitted to be true.

2. In answer to paragraph numbered 2, the Appellee admits that during the period from January 1, 1941, to March 31, 1941, the Appellant, under said name of King & Boozer, was engaged in the manufacture and prefabrication of lumber and in the manufacture of portable or prefabricated houses. The Appellee, however, denies that all of said products or material manufactured by the Appellant were sold by the Appellant in large quantities to purchasers buying in large quantities; and further denies that said purchasers were chiefly the Federal Government, its departments and agencies.

In addition, the Appellee avers that the Appellant during said period was engaged in the business within this State of selling at retail tangible personal property, and as such seller was and is subject to the provisions and terms of the Alabama Sales Tax Act. The Appellee further avers that a substantial portion of the manufactured products, or ma-

terials, or tangible personal property manufactured by the Appellant, including the tangible personal property, the sale of which is made the basis of the assessment in this case, was sold by said Appellant within the State of Alabama at retail, and not for re-sale, within the meaning of the Alabama Sales Tax Act. The Appellee further avers that a substantial portion of the manufactured products, or materials, or tangible personal property manufactured by the Appellant, including the tangible personal property, the sale of which is made the basis of the assessment in this case, was sold at retail to independent contractors with the United States, for use by said contractors in the performance of construction contracts with the United States; and that said contractors, Dunn Construction Company, Inc., and John S. Hodgson and Company, in the performance of said contract did not become such an agency or instrumentality of the United States as to be immune from State taxation in any respect, but that said Dunn Construction Company, Inc., was and is a private corporation, no stock of which is owned by the United States, and that said John S. Hodgson and Company was and is a partnership composed of private individuals, both of which contractors—whether acting jointly or severally—were during said period and still are engaged in business for private profit, and in the performance of said contract were independent contractors.

3. The Appellee admits the allegations contained in paragraph numbered 3 to be true. However, the Appellee further avers that said sales which were made the basis of the assessment of May 15, 1941, were fully and completely consummated and performed, including the payment of the sales price thereof, during the period from January 1, 1941, to March 31, 1941. The Appellee further avers that said sales were made during said period by Appellant to Dunn Construction Company, Inc., and John S. Hodgson and Company, which purchasers were acting jointly, as independent contractors under and pursuant to their said contract with the United States.

3 (a). In answer to paragraph numbered 3 (a), the Appellee denies that the assessment of May 15, 1941, was based upon the sales price of tangible personal property, consisting of lumber, purchased by the United States or by a partnership composed of Dunn Construction Company, Inc., and John S. Hodgson and Company, trading as Dunn Construc-

tion Company, Inc., and John S. Hodgson and Company, as an agent and instrumentality of the United States and in connection with the performance by the partnership of its contract with the United States. On the contrary, the Appellee avers that said assessment was based upon the retail sales price of tangible personal property consisting of lumber, which, during such period, was sold at retail by Appellant to Dunn Construction Company, Inc., and John S. Hodgson and Company, acting jointly as independent contractors in the performance of said contract with the United States; and that said contractors made said purchases and took title to said tangible personal property in their own names as such independent contractors with the United States for use by them in the construction of buildings and improvements mentioned in said contract, and which lumber was so used by said contractors in the performance of said contract; and Appellee denies that said contractors purchased said lumber as agents or instrumentalities of the United States, or that they purchased the same for resale or that they resold the same. The Appellee further avers that the United States was not and is not obligated or bound to the Appellant for or on account of such purchases by said independent contractors, but that such purchases were made solely upon the credit and liability of said independent contractors. The Appellee further avers that said purchases of tangible personal property were not made for or on account of or for the use of the United States of America, but that said property was purchased by said contractors in their capacity as independent contractors in the performance of their obligations under said contract, and was so used by them.

Appellee denies that in and by said contract therein mentioned, the United States agreed to purchase said lumber or building materials or to assume any liability to pay the purchase price or costs thereof, with respect to purchases of such materials made by the contractors in their own [fol. 42] names, or that the United States did, in fact, pay such cost or purchase price, but Appellee admits that under the terms of said contract the United States contracted and agreed as a part of the cost of construction incurred by the contractors, to pay the contractors the amount necessary to reimburse them for the cost of the purchases of such materials, including the amount of sales or use taxes incurred and paid by the contractors in connection with such pur-

chases. Appellee denies that said contractors were an agent or instrumentality of the United States or that said contractors purchased such property or materials for the United States or as agents for the United States but made such purchases in their own names, on their own responsibility and credit and for the purpose of enabling them to construct such improvements in the performance of said contract. Appellee denies that such purchases of materials so made by said contractors were or are immune from taxation by the State of Alabama under the Constitution of the United States or were or are immune from taxation under said Sales Tax Act or were or are exempt under the provisions of said Act, or were or are prohibited from being included within the computation of the tax liability of said Appellant, King and Boozer, under the terms and provisions of said Alabama Sales Tax Act; and Appellee denies that said assessment is illegal or that the requirements of said Act for the passing on of said tax or the amount thereof by said King & Boozer to said purchasers, namely, said contractors, is unconstitutional or invalid or that said assessment is illegal or invalid. For further answer to said paragraph, Appellee avers that said contract between the United States and said Contractors expressly provided for and required the payment by said contractors of all applicable sales taxes or use taxes which might be incurred by said contractors in the purchase by them of materials in connection with the performance by them of said contract, and for the reimbursement by the United States to said contractors of the amount of such taxes, which agreement Appellee avers is valid and binding upon the parties; and Appellee avers that in and by the terms of said contract, or in the performance thereof, with respect to purchases of materials so made by said contractors and involved in said assessment, the United States waived any immunity from said tax or with respect to the burden of said sales tax. Appellee further avers that the United States in and by said contract expressly reserved the right to directly purchase in its own name any of such material, and to furnish the same to said contractors for use by said contractors in such construction, and thus avoid the payment of any sales tax thereon or the economic burden of any such tax with respect thereto, but Appellee denies that the sales or purchases involved in said assessment were direct sales to [fol. 43] or purchases by the United States; and the Appel-

lee avers that the United States in and by said contract in and by the terms of the purchase made thereunder, as to sale involved in said assessment, validly agreed or consented thereto, and waived any immunity with respect to, the payment of said tax so assessed by the State of Alabama against said Appellant, King & Boozer, and to the passing on of said tax by Appellant to or the collection of said tax, or the amount thereof, from said contractor.

3 (b). In answer to paragraph numbered 3 (b) the Appellee denies that the sale of tangible personal property upon which the assessment of May 15, 1941 is based were sales to the United States or for and on behalf of the United States. On the contrary, the Appellee avers that said sales were made to independent contractors and not for or on behalf of the United States; and that said independent contractors were not agents or instrumentalities of the United States; and that said assessment is valid and legal in all respects.

3 (c). In answer to paragraph numbered 3 (c) the Appellee denies that said sales were made to the United States or to agents and instrumentalities of the United States who purchased for and on behalf of the United States exclusively; but the Appellee avers that said sales were made to independent contractors with the United States, who purchased for and on behalf of themselves as such contractors in the performance of said contract; and that said assessment is legal and valid in all respects.

3 (d). In answer to paragraph numbered 3 (d) the Appellee denies that said sales were made to the United States or to agents and instrumentalities of the United States for and on behalf of the United States. On the contrary, the Appellee avers that said sales as aforementioned were made to independent contractors with the United States; and that said sales are not exempt under subsection (a) of Sec. V of the Alabama Sales Tax Act.

3 (e). In answer to paragraph numbered 3 (e) the Appellee denies that the State Department of Revenue in applying the provisions of Act No. 18 of the General Acts of Alabama, Regular Session, 1939, page 16, to the sales made the basis of the assessment in this case, has applied the provisions of that Act in a manner which renders said Act invalid and void under the Constitution of the United States; and

the Appellee denies that said sales were made to the United States, or to its agents and instrumentalities, or for or on behalf of the United States.

3 (f). In answer to paragraph numbered 3 (f) the Appellee denies that the sales of tangible personal property upon which said assessment is based were sales to the United States, or for or on behalf of the United States, or that said sales were consummated at a point or place within an area [fol. 44] over which the United States has or had exclusive jurisdiction during said period. The Appellee further denies that said sales are immune from taxation by the State of Alabama as having been made and consummated upon an area over which the United States has exclusive jurisdiction.

On the contrary, the Appellee avers that said sales were made and consummated at the place of business of the Appellant in the State of Alabama, which place of business neither was nor is located upon Camp McClellan, Alabama, or upon an area over which the United States had exclusive jurisdiction during such period, in this, that inspection, delivery, and passage of title took place at said place of business of said Appellant, and said sales were fully consummated and performed at such place of business. The Appellee further avers that said sales took place and were fully performed and consummated, including the payment of the sales price thereof, during the period from January 1, 1941, to March 31, 1941, during which period in and by the terms of An Act of Congress (Public No. 819, 76th Congress, approved October 9, 1940), there was in force and effect an express release or waiver by the United States of exclusive jurisdiction over said Camp McClellan, insofar as such jurisdiction affected the power of the State to levy or impose a sales or use tax upon sales or purchases made upon or within any such area.

If appellee is mistaken in alleging that said sales were wholly consummated outside of the area known as Fort McClellan (or Camp McClellan) appellee avers that said sale- were not made wholly within such area and constituted transactions subject to the tax imposed upon Appellant under said Act and the assessment made pursuant thereto.

3 (g). In answer to paragraph numbered 3 (g) the Appellee denies that the enactment of Act No. 18 of the legislature of Alabama, Session of 1939, as approved February

8, 1939, (General Acts, Regular Session 1939, page 16) insofar as it authorizes the assessment of May 15, 1941, and subjects to taxation said sales of tangible personal property involved in said assessment is invalid and void because violative of the Constitution of the United States. The Appellee avers that said Act No. 18, known as the Alabama Sales Tax Act, and the assessment of May 15, 1941, made in pursuance and under the authority thereof, is valid and legal in all respects and is not in violation of the Constitution of the United States.

4 (a). The Appellee admits the allegations of paragraph numbered 4 (a), but does not admit or concede that the failure or inability of the Appellant to collect said taxes or a sum equal in amount thereto is a defense to the claim of the Appellee against the Appellant for the taxes due under and by reason of said assessment of May 15, 1941. The [fol. 45] Appellee avers that the Alabama Sales Tax is a license or privilege tax levied upon the seller for the privilege of engaging in the business of selling tangible personal property at retail, and that said Act requires the seller to add to the sales price of the tangible property an amount equal to the tax levied upon him as the seller, but that the failure, refusal, or inability of the seller to pass said tax on to the buyer does not relieve said seller from its liability to the State of Alabama for the tax levied by said Act.

And now having fully answered said Bill, the Appellee prays that it may be hence dismissed with its reasonable costs in this behalf expended.

Thomas S. Lawson, Attorney General; John W. Lapsley, Assistant Attorney General; J. Edward Thornton, Assistant Attorney General, Solicitors for Appellee.

[File endorsement omitted.]

[fol. 46] IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

AGREED STATEMENT OF FACTS—Filed May 29, 1941

It is agreed by and between the Appellant and the Appellee in the above cause, by and through their respective attorneys of record, that the following stipulation of facts

shall be and constitute an agreed statement of facts on the submission or trial of said cause, and that the Court shall consider the same, insofar as material, as fully and completely as if testified to or introduced as evidence under the ordinary rules of evidence. Either party may introduce additional evidence on the hearing of said cause should it desire to do so.

Such stipulation and agreed statement of facts is as follows:

1. That the transcript of proceedings before the State Department of Revenue as certified by Julia Klinge, Secretary of the State Department of Revenue, under date of May 24, 1941, and filed in this cause is a true and correct copy of the proceedings had before said Department relating to the assessment involved in this cause, and that such certified transcript shall, upon said trial, be introduced in evidence and considered by the Court. The stipulation contained in this paragraph, however, shall not be construed as an admission by the Appellant of the legality or validity of the assessment shown therein, nor the liability for the tax, penalty or interest thereon mentioned in said assessment, nor as a waiver by the Appellant of any right with respect to any liability or purported liability of the said Appellant for the payment of any sales tax to the State of Alabama, nor as a waiver of any right of the Appellant to contest such assessment, or liability or the validity thereof, or the validity of any Act imposing or purporting to impose any such tax.

2. That Exhibit "1" attached hereto is a true and correct copy of the contract entered into by and between the United States of America and Dunn Construction Company, Inc., and John S. Hodgson and Company, on the 9th day of September, 1941, and which contract, it is agreed, was in full force and effect during the period covered by the assessment hereinabove mentioned and involved in this cause; and which contract was executed for the construction of certain buildings and improvements mentioned in said contract, pursuant to and under the authority of the Acts of Congress mentioned in said contract, namely, Public [fol. 47] No. 611, 76th Congress, approved June 13, 1940, and Public No. 703, 76th Congress, approved July 2, 1940.

3. That Dunn Construction Company, Inc., is a corporation organized under the laws of the State of Delaware, with

its principal place of business in the State of Alabama at Birmingham, Alabama, in which corporation the United States owns no interest, and that John S. Hodgson and Company is a partnership composed of John S. Hodgson and Alcie J. Hodgson, both of the City of Birmingham, Alabama, and the said Dunn Construction Company, Inc., and John S. Hodgson and Company (hereinafter sometimes called the contractor), in the execution and performance of said contract aforementioned, were acting jointly as members of a co-venture.

4. Appellant is a partnership consisting of Tom Cobb King and Simon Elbert Boozer, both residents of the City of Anniston, Calhoun County, in the State of Alabama, and having its principal place of business in the City of Anniston in the State of Alabama. That the Appellant, during the period January 1, 1941, to and including March 31, 1941, was engaged at Anniston, Alabama, in the business of prefabricating lumber and the manufacture or prefabrication of portable houses for sale. That the sales of tangible personal property involved in this cause were made by the Appellant and made by the Appellant during the period from January 1, 1941, to and including March 31, 1941 (in addition to the sale at retail of tangible personal property reported to the State Department of Revenue in quarterly sales tax return filed by Appellant for said period, and upon which a tax in the amount of \$16.42 was paid), aggregated in gross sales price the sum of \$61,835.63, which amount was received by him during said period, with respect to which gross sales no sales tax return was made by Appellant to the State of Alabama, and no sales tax was paid thereon by Appellant to the State of Alabama. That the aforesaid sales of tangible personal property made by Appellant during the period January 1, 1941, to and including March 31, 1941, in the gross amount of \$61,835.63, and involved in the assessment in these proceedings, were made in the manner hereinafter set forth and stated with respect to certain building material, hereinabove described in purchase order number 2565, a true and correct copy of which order is hereto attached, marked Exhibit "3", and made a part hereof.

5. (a) That pursuant to a proposal previously submitted by the Appellant in writing to the partnership of Dunn Construction Company, Inc., and John S. Hodgson and Com-

pany, to sell large quantities of prefabricated lumber at a stipulated price for use in the performance by said partner-[fol. 48] ship, Dunn Construction Company, Inc., and John S. Hodgson and Company (hereinafter called contractor), of its contract entered into by said contractor with the United States of America on the 9th day of September, 1940, a true and correct copy of which contract is hereto attached, marked Exhibit "1", and made a part hereof, and which contract was in full force and effect during the period covered by the assessment here involved, and which said proposal had been submitted by the said contractor to the Constructing Quartermaster at Fort McClellan for his approval, and which had been approved by him, said contractor, on January 16, 1941, prepared and submitted to the Constructing Quartermaster a paper or document, of which Exhibit "2" hereto attached is a true and correct copy, and requested the approval by said Constructing Quartermaster of said purchase, which approval was endorsed thereon as shown by said Exhibit "2" hereto attached and made a part of this agreement. That Raymond P. Reeves whose name appears on said Exhibit "2" was an employee of said contractor.

(b) That thereafter on January 17, 1941, the said contractor submitted to the Appellant at Anniston, Alabama, an order for the material described in Exhibit "2", as shown by a true and correct copy of such order attached hereto, marked Exhibit "3", and made a part hereof. That the said Raymond P. Reeves whose name appears on said Exhibit "2" was an employee of the contractor aforesaid, and was the duly authorized agent of said contractor.

(c) That upon receipt of said purchase order mentioned in subsection (b) of this paragraph, Appellant, at its plant or principal place of business at Anniston in the State of Alabama, loaded the material ordered and mentioned in subsections (b) and (c) of this paragraph upon the trucks operated by a contract carrier engaged by Appellant for the purpose of transporting said lumber from Appellant's place of business at Anniston, Alabama, to a designated point within Fort McClellan.

(d) That at the time the Appellant loaded the lumber aforesaid upon the trucks of the contract carrier aforesaid and at the Appellant's place of business at Anniston in the

State of Alabama, the materials were checked and inspected and two reports thereof were made, one as shown by report entitled "Receiving and Inspection Report", a true and correct copy of which is hereto attached, marked Exhibit "4", and made a part hereof, and which was a report required to be made by the Constructing Quartermaster, and which report was signed by E. C. Overton, an employee of the contractor aforesaid, and by J. F. Thompson, an employee of the United States representing the Constructing [fol. 49] Quartermaster, and the other report entitled "Receiving and Inspection Report", a true and correct copy of which is hereto attached, marked Exhibit "4A" and made a part hereof, was a report made to the contractor, and was signed by said E. C. Overton and J. F. Thompson in their respective capacities as above stated.

(e) That the materials so delivered at Fort McClellan, and the materials mentioned and described in Exhibits "2", "3", "4" and "4A" were used in the performance of the contract aforesaid, a true and correct copy of which is hereto attached, marked Exhibit "1", and made a part hereof.

(f) Exhibit "5" hereto attached and made a part hereof is a true and correct copy of the original invoice of the Appellant to the contractor aforesaid on account of the purchase hereinabove described, and of said endorsements noted thereon. The endorsements made on this Exhibit were made thereon by the parties indicated, in the capacities indicated, and all appear upon the original of said invoice. The Appellant's invoice hereinabove mentioned and described was delivered to the contractor aforesaid on January 18, 1941, and on January 21, 1941, that invoice, along with others not involved in this case, was transmitted to the Constructing Quartermaster at Fort McClellan, Alabama, for his approval for payment by said contractor of said invoice, all of which will appear from Exhibit "6" which is a true and correct copy of the original invoice transmittal, and which is hereto attached and made a part hereof, and that the said invoice was approved for payment by said Constructing Quartermaster on January 29, 1941, as will be shown by Exhibit "7" hereto attached and made a part hereof.

(g) That thereafter but prior to February 3, 1941, said contractor, namely, Dunn Construction Company, Inc., and

John S. Hodgson and Company, issued their joint check payable to Appellant in full payment of invoice marked Exhibit "5", said check being drawn in the amount of \$68.23, being the amount of \$68.40 less one-quarter of one per cent discount, which check was drawn upon a joint account or deposit in the First National Bank of Anniston, Alabama, and which check upon presentation was paid in due course.

(h) That thereafter on March 5, 1941, the contractor aforesaid submitted its voucher number 565, a true and correct copy of which is attached hereto, marked Exhibit "8", and made a part hereof, to the United States War Department, through the Constructing Quartermaster at Fort McClellan, for reimbursement for its expenditures aggregating \$1,991.62, and including its expenditure of \$68.23 [fol. 50] made to the Appellant as aforesaid in and about the purchase of materials hereinabove mentioned, but which voucher did not include any amount for Alabama sales tax thereon or with respect thereto, no such tax having been paid by the contractor or by the Appellant.

(i) That thereafter the Field Auditor of the Constructing Quartermaster and the Constructing Quartermaster approved said voucher for payment, and on February 5, 1941, said voucher number 565, of which Exhibit "8" is a true and correct copy, was paid by the Finance Office at Fort McClellan to said contractor by United States Government check dated February 5, 1941, being check number 26948 and for the sum of \$1991.62, payable to said contractor, which said check was in payment of voucher number 565, above mentioned.

(j) That in submitting for payment voucher number 565 above mentioned, which included request for reimbursement for the contractor's payment to the Appellant as aforesaid, the contractor supported its voucher by attaching thereto its request made to the Constructing Quartermaster for approval of said purchase, bearing the approval of said Constructing Quartermaster for said purchase, a true and correct copy of which is hereto attached as Exhibit "2", copies of its purchase order to the Appellant, a copy of which is hereto attached as Exhibit "3", the two receiving and inspection reports, copies of which are hereto attached as Exhibits "4" and "4A", and said invoice of the Appellant, a copy of which is attached hereto as Exhibit "5".

6. It is further stipulated and agreed that all of the Appellant's sales of tangible personal property which are involved here were made by it in connection with the performance by the contractor of its contract with the United States hereinabove referred to, a copy of which contract is hereto attached, marked Exhibit "1", and made a part hereof, and that such property was sold, paid for and reimbursement made therefor in the manner above stated.

7. It is farther stipulated that in the performance of said contract between the contractor and the United States, in some instances, not involved in the assessment hereinabove mentioned, competitive bids for material required for the performance of said contract were called for by the Quartermaster General of the United States with respect to various materials to be used in such performance, and after the acceptance of one of the bids received in response to said call, the Quartermaster General informed the Constructing Quartermaster and the contractor of such acceptance, and requested or directed the contractor above [fol. 51] mentioned to purchase said materials from said competitive bidder for and in connection with the performance of the contractor's said contract with the United States hereinabove mentioned, which purchase was thereafter handled in the same manner as if said bid has been originally submitted to said contractor, and said materials were paid for by said contractor and bills for reimbursement therefor were submitted, approved and paid to said contractor in the same manner as in the case of the typical transaction hereinabove mentioned and described in detail.

8. That said Fort McClellan is located upon and constitutes an area situated in Calhoun County in the State of Alabama. That in the year 1918, the lands comprising such area now known as Fort McClellan were acquired by the United States of America by purchase from the individual owners of such lands, and that the deeds thereto from such owners were duly executed and delivered to the United States in the year 1918, which deeds conveyed or purported to convey therein a fee simple title to said lands; and that since such acquisition thereof the United States has continuously used such area as a military reservation or fort; and that all of the buildings and improvements mentioned in said contract executed under date of September 9, 1940, were constructed or required to be constructed upon such

area known and hereinafter referred to as Fort McClellan (not including the acquisitions of the United States subsequent to November 18, 1940, for maneuver purposes, which additional areas are not involved herein).

9. It is further stipulated and agreed that the Constructing Quartermaster at Fort McClellan was a representative at Fort McClellan of the Contracting Officer, C. D. Hartman, Brigadier General, Quartermaster Corps, United States Army, and that said Constructing Quartermaster was duly authorized to act for and on behalf of the United States and the Contracting Officer, in all matters pertaining to the contract mentioned in paragraph 2, a true and correct copy of which is hereto attached, marked Exhibit "1", and made a part hereof.

10. It is further stipulated and agreed that Appellant has billed the partnership composed of Dunn Construction Company, Inc., and John S. Hodgson and Company for the taxes or for a sum equal to the amount of the taxes assessed against Appellant as aforesaid in paragraph 4 hereof, but which have not been paid.

Fred L. Blackmon, Knox, Liles, Jones & Blackman, Attorneys for the Appellant. Thomas S. Lawson, Attorney General of the State of Alabama. John [fol. 52] W. Lapsley, Assistant Attorney General of the State of Alabama. J. Edward Thornton, Assistant Attorney General of the State of Alabama, Attorneys for the Appellee.

[File endorsement omitted.]

[fol. 53] EXHIBIT "1" TO AGREED STATEMENT OF FACTS

United States of America, War Department

Washington, May 13, 1941.

I hereby certify that I am the custodian of the files of the office of the Quartermaster General, War Department, and that the attached Contract No. W 6119 qm-161, dated September 9, 1940, with Dunn Construction Company, Inc., and John S. Hodgson and Company for construction of a complete tent camp, including necessary buildings, temporary structures, utilities and appurtenances thereto, is a

true copy of the contract in my custody in the Office of The Quartermaster General.

Agnes N. Kilmartin, Principal Clerk Mail & Records Branch, Office of The Quartermaster General.

I hereby certify that Agnes N. Kilmartin, who signed the foregoing certificate, is the Custodian of the files of the Office of the Quartermaster General, War Department, and that to her certification as such full faith and credit are and ought to be given.

In Testimony Whereof, I Henry L. Stimson, Secretary of War, have hereunto caused the seal of the War Department to be affixed and my name to be subscribed by the Assistant Chief Clerk of the said Department, at the City of Washington, this 13th day of May, 1941.

Henry L. Stimson, Secretary of War (Seal), by
F. M. Hoadley, Assistant Chief Clerk.

[foi. 54]

Contract No. W 6119 qm-161
O. I. No. 70-41

Cost-Plus-A-Fixed-Fee Construction Contract

War Department

Contractor Dunn Construction Company, Inc., and John S. Hodgson and Company, Birmingham, Alabama.

Fixed-Fee, \$125,865.00.

Contract for construction of a complete tent camp, including necessary buildings, temporary structures, utilities and appurtenances thereto.

Place Fort McClellan, Alabama.

Estimated cost of project, \$3,204,588.00.

Payments to be made by Finance Officer at Fort McClellan, Alabama.

The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to the following procurement authorities, the available balances of which are sufficient to cover the cost of the same:

QM 8047 P3-3211 A 0002.003-02

(S.) M. B. Birdseye, Major, QMC.

This contract is authorized by the following laws:

Public No. 611—76th Congress, approved June 13, 1940.

Public No. 703—76th Congress, approved July 2, 1940.

This Contract, entered into this 9th day of September, 1940 by The United States of America, hereinafter called the Government, represented by the Contracting Officer executing this contract, and Dunn Construction Company, Inc., a corporation organized and existing under the laws of the State of Delaware, and John S. Hodgson and Company a partnership consisting of John S. Hodgson and Alcie J. Hodgson, both of the City of Birmingham in the State of Alabama, hereinafter called the Contractor, witnesseth that:

Whereas, the Government desires to have constructed a complete tent camp, including necessary buildings, temporary structures, utilities and appurtenances thereto at Fort McClellan, Alabama.

Whereas, the accomplishment of the above-described work under a cost-plus-a-fixed-fee contract, entered into after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law; and

Whereas, as a result of such negotiations, the Secretary of War has directed that the Government enter into a cost-[fol. 55] plus-a-fixed-fee contract with the Contractor for the accomplishment of the above-described work;

Now, Therefore, the parties hereto do mutually agree as follows:

Article I—Statement of work.

1. The Contractor shall, in the shortest possible time, furnish the labor, materials, tools, machinery, equipment, facilities, supplies not furnished by the Government and services, and do all things necessary for the completion of the following work: Construction of a complete tent camp, including necessary buildings, temporary structures, utilities and appurtenances thereto and comprising 76 mess halls, 4 officers' quarters, 12 administration buildings, 2 fire stations, Post Office, 1 telegraph and telephone office, 10 Post Exchanges, service club, 7 recreation buildings, 8 infirmaries, utility shop, 14 motor repair shops, 8 storehouses, 15 warehouses, 1 gasoline storage, incinerator, bakery and equipment, laundry and equipment, cold storage building, 81 lavatory buildings, stockade fence; also a hospital unit

with equipment consisting of administration building, 4 nurses' quarters, 2 officers' quarters, 3 mess halls, 6 barracks, 2 clinics, 1 Physiotherapy building, 14 wards, 3 storehouses, morgue, covered walks, service roads and heating plant; also floors, framing and screening for 3205 tents and 1 theatre tent; also the installation of general utilities consisting of electric service, railroad, roads and walks, sewer, telephone and telegraph and water; also the grading and clearing necessary for preparation of the camp site. In accordance with the drawings and specifications or instructions contained in appendix "A" hereto attached and made a part hereof, or to be furnished hereafter by the Contracting Officer and subject in every detail to his supervision, direction, and instructions.

It is estimated that the total cost of the construction work covered by this contract will be approximately Three Million Two Hundred Four Thousand and Five Hundred Eighty-Eight Dollars (\$3,204,588.00), exclusive of the Contractor's fee, and that the work herein contracted for will be ready for utilization by the Government within one and one-half ($1\frac{1}{2}$) months from the date of this contract. It is expressly understood, however, that the Contractor does not guarantee the correctness of either of these estimates. The estimated total cost set forth above is based upon a detailed estimate agreed to by both the Government and the Contractor, a copy of which is on file in the office of The [fol. 56] Quartermaster General of the Army.

In consideration for his undertaking under this contract the Contractor shall receive the following:

(a) Reimbursement for expenditures as provided in Article II.

(b) Rental for Contractor's equipment as provided in Article II.

(c) A fixed fee in the amount of One Hundred Twenty Eight Thousand Eight Hundred Sixty-Five Dollars (\$128,865.00) which shall constitute complete compensation for the Contractor's services, including profit and all general overhead expenses.

2. The Contracting Officer, may at any time, by a written order and without notice to the sureties, make changes in or additions to the drawings and specifications, issue and addi-

tional instructions, require additional work, or direct the omission of work covered by the contract. If such changes cause a material increase or decrease in the amount or character of the work to be done under this contract, or in the time required for its performance an equitable adjustment of the amount of the fixed fee to be paid to the Contractor shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: Provided, however, That the Contracting Officer, if he determines that the facts justify such action, may receive and consider, and, with the approval of the Chief of Branch, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article XV hereof. But nothing provided in this article shall excuse the Contractor from proceeding with the prosecution of the work so changed.

3. The title to all work, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment and supplies, for which the Contractor shall be entitled to be reimbursed under Article II, shall vest in the Government. These provisions as to title being vested in the Government shall not operate to relieve the Contractor from any duties imposed under the terms of this contract.

[fol. 57] 4. The work shall be executed in the best and most workmanlike manner by qualified, careful, and efficient workers, in strict conformity with the best standard practices.

5. Except it be otherwise authorized by the Contracting Officer, all materials shall be of the best quality of their respective kinds. If the Contracting Officer requires that the Contractor submit for prior approval samples of materials proposed for use in the work covered by this contract, the Contractor shall make no commitments for such materials until the submitted sample has been approved by the Contracting Officer.

Article II—Cost of the Work

Reimbursement for Contractor's Expenditures

1. The Contractor shall be reimbursed in the manner hereinafter described for such of his actual expenditures in the performance of the work as may be approved or ratified by the Contracting Officer and as are included in the following items:

(a) All labor, material, tools, machinery, equipment, supplies, services, power and fuel necessary for either temporary or permanent use for the benefit of the work. All articles of machinery or equipment valued at \$300 or less shall be classed as tools and shall be charged directly to the work. Title thereto shall thereupon pass to the Government.

(b) All subcontracts made in accordance with the provisions of this agreement.

(c) Rental actually paid by the Contractor, at rates not to exceed those approved by the Contracting Officer, for construction plant in sound and workable condition, such as pumps, derricks, concrete mixers, boilers, clamshell or other buckets, electric motors, electric drills, electric hammers, electric hoists, mechanical shovels, locomotive cranes, power saws, engineers' levels and transits, and such other equipment exceeding \$300 in value as may be necessary for the proper and economical prosecution of the work. Each contract for the rental of construction plant or parts thereof by the Contractor from third parties shall be in a form prescribed by the Secretary of War, shall be subject to approval by the Contracting Officer, and shall contain the same provisions entitling the Government to acquire title to such plant or any part thereof upon the same conditions as those contained in paragraph 2 of Article II of this contract.

(d) Loading and unloading at the site of the work of construction plant, owned or rented by the Contractor; the [fol. 58] transportation thereof place or places where it is to be used in connection with said work, and return transportation f. o. b. cars to the point of original shipment or equivalent mileage, except as hereinafter set forth; the installation and dismantling thereof, and such repairs and spare parts as are not included in the rental; provided such repairs or spare parts are not made necessary by defects

in such plant, or parts thereof, or by the fault or negligence of the Contractor or his employees; but charges for transportation of such construction plant over distances in excess of 500 miles must have the written authorization of the Contracting Officer in advance.

(e) Transportation charges on materials and supplies.

(f) Transportation and traveling expenses to and from the work of the necessary field forces for the economical and successful prosecution of the work; expenses of procuring labor and expediting the production and transportation of material and equipment. Expenditures under these items must have the written authorization of the Contracting Officer in advance.

(g) Salaries of resident engineers, superintendents, time-keepers, foremen, and other field employees of the Contractor in connection with the work. In case the full time of any field employee of the Contractor is not applied to the work his salary shall be included in this item only in proportion to the actual time applied thereto. No person shall be assigned to service by the Contractor as superintendent of construction, chief engineer, chief purchasing agent, chief accountant, or similar position in the Contractor's field organization, or as principal assistant to any such person, until there has been submitted to and approved by the Contracting Officer a statement of the qualifications and experience of the person proposed for such assignment. The regular salary or compensation rate of any such person shall not be in excess of the highest salary or compensation rate received by him during the year preceding the date of this contract plus such increase as the Contracting Officer may approve.

(h) Temporary rights in land required in connection with the work.

(i) Buildings and equipment required for necessary field offices, commissary, hospital and other facilities and the cost of maintaining and operating said offices, hospital and other facilities, including minor expenses such as telegrams, telephone service, expressage, and postage. The cost of maintaining commissary buildings and utility service therein will be reimbursed but the cost of all commissary operating [fol. 59] personnel and supplies will be borne by the Con-

tractor. All commissaries shall be operated as nearly as possible without profit or loss and shall be subject to such sanitary regulations as the Contracting Officer may prescribe.

(j) Premiums on such bonds and insurance policies as the Contracting Officer may require for the protection of the Government; the cost of all public liability, employer's liability, workmen's compensation, fidelity, fire, theft, burglary, and other insurance that the Contracting Officer may approve as reasonably necessary for the protection of the Contractor.

(k) Losses and expenses, not compensated by insurance or otherwise (including settlement made with the written consent of the Contracting Officer), actually sustained by the Contractor in connection with the work and found and certified by the Contracting Officer to be just and reasonable.

(l) The cost of reconstructing and replacing any of the work destroyed or damaged, and not covered by insurance, but expenditures under this item must have the written authorization of the Contracting Officer in advance.

(m) Payments from his own funds made by the Contractor under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees, and royalties on patents used including those owned by the Contractor.

(n) Such portion of the transportation, traveling, and hotel expenses of officers, engineers, and other employees of the Contractor as is actually incurred in connection with this work. Expenditures under this item must have the written authorization of the Contracting Officer in advance.

(o) When specifically approved in advance by the Chief of Branch, a reasonable allowance for work done in the Contractor's general offices exclusively for and directly chargeable to the work.

(p) Such other items as should, in the opinion of the Contracting Officer, be included in the cost of the work. When

such an item is allowed by the Contracting Officer, it shall be specifically certified as being allowed under this paragraph.

(q) It is agreed that, unless otherwise authorized by the [fol. 60] Contracting Officer, all allowances as items of cost on account of the work under this contract for travel expenses and subsistence provided for herein shall conform to the allowances authorized by the "Standardized Government Travel Regulations."

Rental for Contractor's Equipment

2. Rental shall be paid to the Contractor for such construction plant or parts thereof as he may own and furnish, at not to exceed the rates approved by the Contracting officer. Except as specified below, such rental shall begin on the date of the delivery of such plant, or parts thereof, to a common carrier for shipment to the site of the work, as evidenced by the bill of lading covering such shipment, and shall terminate, unless title thereto passes to the Government at an earlier date, on the date of the delivery of such plant, or parts thereof, to a common carrier for shipment from the site of the work, as evidenced by the bill of lading covering such shipment, provided such plant, or parts hereof, are so delivered without delay after notice by the Contracting Officer to the Contractor that such plant or parts thereof, are no longer required; otherwise, the rental shall terminate on the date of such notice. If such plant, or any part thereof, is not in sound and workable condition when it arrives at the site of the work, the rental period therefor shall not begin until such plant, or parts thereof, shall have been placed in sound and workable condition at the expense of the Contractor and no rental therefor shall be paid for any prior period. If such plant, or parts thereof, cannot be placed in sound and workable condition, no transportation charges for the shipment thereof shall be included in the cost of the work or paid, either directly or indirectly, by the Government. Determination as to whether such plant, or parts thereof, are in sound and workable condition shall, in every instance, be made by the Contracting Officer. Slight delays in the use of such plant, or parts thereof, caused by necessary minor or field repairs and replacements shall not interrupt the rental period, but no rental shall be paid for the period of any delay in the

use of such plant, or parts thereof, caused by other than necessary minor or filed repairs. When such construction plant or any part thereof shall arrive at the site of the work, the Contractor shall file with the Contracting Officer a schedule setting forth the fair valuation at that time of each part of such construction plant. Such valuation shall be deemed final unless the Contracting Officer shall, within 10 days after the machinery has been set up and working, modify or change such valuation. When and if the total [fol. 61] rental paid to the Contractor for any such part shall equal the valuation thereof, plus one per cent (1%) per month for each month or fraction thereof such part has been in use, no further rental therefor shall be paid to the Contractor, and title thereto shall vest in the Government. At the completion of the work or upon termination of the contract as provided in article VI, the Government may at its option purchase any part of such construction plant by paying to the Contractor the difference between the valuation of such part or parts, plus one per cent (1%) per month for each month or fraction thereof such part or parts have been in use and the total rentals theretofore paid for such part or parts.

General

3. The Government reserves the right to furnish any materials, construction equipment, machinery, or tools necessary for the completion of the work.

4. The Government reserves the right to pay directly to common carriers any or all freight charges on construction plant, materials, and supplies.

5. The Government reserves the right to pay directly to the persons concerned all sums due from the Contractor for labor, materials, or other charges.

6. Rates of rental as substitutes for scheduled rental rates may be agreed upon in writing between the Contractor and the Contracting Officer, such rates to be in conformity with similar rates of rental charged in the particular territory in which the work covered by this contract is to be performed. Such substitute rates shall be subject to the approval of the Chief of Branch, but shall be followed until so approved, at which time any necessary adjustments in prior payments will be made.

7. No salaries of the Contractor's executive officers, no part of the expense incurred in conducting the Contractor's main office or regularly established branch offices, and no overhead expenses of any kind, except as specifically authorized in section 1 of this article, shall be included in the cost of the work; nor shall any interest on capital employed or on borrowed money be included in the cost of the work.

8. The Contractor shall, to the extent of his ability, take all cash and trade discounts, rebates, allowances, credits, salvage, commissions, and bonifications, and when unable to take advantage of such benefits he shall promptly notify the Contracting Officer to that effect and the reason therefor. In determining the actual net cost of articles and [fol. 62] materials of every kind required for the purpose of this contract, there shall be deducted from the gross cost thereof all cash and trade discounts, rebates, allowances, credits, salvage, commissions, and bonifications which have accrued to the benefit of the Contractor or would have so accrued except for the fault or neglect of the Contractor. Such benefits lost through no fault or neglect on the part of the Contractor, or lost through fault of the Government, shall not be deducted from gross costs.

9. All revenue from the operations of the hospital or other facilities, except commissaries, or from rebates, discounts, refunds, etc., shall be accounted for by the Contractor and applied in reduction of the cost of the work.

Article III—Payments

Reimbursement for Cost

1. The Government will currently reimburse the Contractor for expenditures made in accordance with article II upon certification to and verification by the Contracting Officer of the original signed pay roll for labor, the original paid invoices for materials, or other original papers. Generally, reimbursement will be made weekly but may be made at more frequent intervals if the conditions so warrant.

Rental for Contractor's Equipment

2. Rental as provided in article II for such construction plant or parts thereof as the Contractor may own and furnish shall be paid monthly upon presentation of proper vouchers.

Payment of the Fixed-Fee

3. The fixed-fee prescribed in article I shall be compensation in full for the services of the Contractor, including profit and all general overhead expenses. Ninety per cent (90%) of said fixed-fee shall be paid as it accrues, in monthly installments based upon the percentage of the completion of the work as determined from estimates made and approved by the Contracting Officer. Upon completion of the work and its final acceptance, any unpaid balance of the fee shall be paid to the Contractor. If the contract is terminated for the convenience of the Government, before completion, the Contractor will be paid that proportion of the prescribed fee which the work actually completed bears to the entire project, less fee payments previously made. If the contract is terminated due to the fault of the Contractor, no additional payments on account of the fee will be made.

[fol. 63] Payment by Contractor

4. If bills for purchase of material, machinery or equipment or payrolls covering employment of laborers or mechanics incurred by the Contractor or by any subcontractor hereunder are not promptly paid by the Contractor or subcontractor as the case may be, the Contracting Officer may, in his discretion, withhold from payments otherwise due the Contractor any amount equivalent to the amount of any such bill or pay roll. Should the Contractor neglect or refuse to pay such bills or pay rolls or to direct any subcontractor to pay such bills or pay rolls within five (5) days after notice from the Contracting Officer so to do, the Government shall have the right to pay such bills or pay rolls directly, in such event a deduction equal to five per cent (5%) of the amount so paid directly shall be made from the Contractor's fee.

Final Payment

5. Upon completion of the work and its final acceptance in writing by the Contracting Officer, the Government shall pay to the Contractor the unpaid balance of the cost of the work determined under Article II hereof, and of the fee, less any sum that may be necessary to settle any unsettled claims for labor or material, or any claim the Government may have against the Contractor. The Contracting Officer

shall accept the completed work with reasonable promptness. The Contractor shall, if required, furnish the Government with a release of all claims against the Government arising under and by virtue of this contract other than such claims, if any, as be specifically excepted by the Contractor from the operation of the release in stated amounts to be set forth therein.

Article IV—Records and accounts—Inspection and audit

1. The Contractor agrees to keep records and books of account on a recognized cost-accounting basis, showing the actual cost to him of all items of labor, materials, equipment, supplies, services, and other expenditures of whatever nature for which reimbursement is authorized under the provisions of this contract. The system of accounting to be employed by the Contractor shall be such as is satisfactory to the Contracting Officer.

2. The Contracting Officer shall at all times be afforded proper facilities for inspection of the work and shall at all times have access to the premises, work and materials, to all books, records, correspondence, instruction, plans, drawings, receipts, vouchers, and memoranda of every description of the Contractor pertaining to said work; and the [fol. 64] Contractor shall preserve for a period of 3 years after completion or termination of this contract, all the books, records, and other papers herein mentioned.

3. Any duly authorized representative of the Contractor shall be accorded the privilege of examining the books, records, and papers of the contracting officer relating to the cost of the work for the purpose of checking up and verifying such cost.

Article V—Special requirements.

1. The contractor hereby agrees that he will:

(a) Procure and thereafter maintain such bonds and insurance in such forms and in such amounts and for such amounts and for such periods of time as the Contracting Officer may approve or require.

(b) Procure all necessary permits and licenses; obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States of America, of the State,

Territory, or subdivision thereof wherein the work is done, or of any other duly constituted public authority.

(c) Unless this provision is waived in writing by the contracting officer, reduce to writing every contract in excess of two thousand dollars (\$2,000) made by him for the purpose of the work hereunder for services, materials, supplies, machinery, or equipment, for the use thereof; insert therein a provision that such contract is assignable to the Government; make all such contracts in his own name, and not bind or purport to bind the Government or the Contracting Officer thereunder. No purchases in excess of \$500 shall be made or placed without the prior approval of the Contracting Officer.

(d) Enter into no subcontract for any portion of the work, except in the form prescribed by the Secretary of War, nor without the written approval of the Contracting Officer. Subcontracts are defined as contracts entered into by the Contractor with others which involve the performance, wholly in or in part at the site of the work, or some part of the work described in Article I hereof.

(e) At all times during the progress of the work keep at the site thereof a duly appointed and qualified representative who shall receive and execute on the part of the Contractor such notices, directions, and instructions as the Contracting Officer may give.

(f) The Contracting Officer may require the Contractor to dismiss from the work such employee as the Contracting Officer deems incompetent, careless, insubordinate, or [fol. 65] otherwise objectionable.

(g) At all times use his best efforts in all acts hereunder to protect and subserve the interest of the Government.

Article VI—Termination of contract by Government.

1. Should the Contractor at anytime refuse, neglect, or fail to prosecute the work with promptness and diligence, or default in the performance of any of the agreements herein contained, or should conditions arise which make it advisable or necessary in the interest of the Government to cease work under this contract, the Government may terminate this contract by a notice in writing from the Contracting Officer to the Contractor. Such termination

shall be effective in the manner and upon the date specified in said notice and shall be without prejudice to any claims which the Government may have against the Contractor. Upon receipt of such notice the Contractor shall, unless the notice directs otherwise, immediately discontinue all work and the placing of all orders for materials, facilities, and supplies in connection with performance of this contract and shall proceed to cancel promptly all existing orders and terminate work under all subcontracts insofar as such orders and/or work are chargeable to this contract.

2. If this contract is terminated for the fault of the Contractor, the Contracting Officer may enter upon the premises and take possession, for the purpose of completing the work contemplated by this contract, of all materials, tools, equipment, and appliances and all options, privileges, and rights, and may complete or employ any other person or persons to complete said work.

3. Upon the termination of this contract as hereinbefore provided, full and complete settlement of all claims of the Contractor arising out of this contract shall be made as follows:

(a) The Government shall assume and become liable for all obligations, commitments, and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and in accordance with the provisions of this contract; and the Contractor shall, as a condition of receiving the payments mentioned in this article, execute and deliver all such papers and take all such steps as the Contracting Officer may require for the purpose of fully vesting in the Government the rights and benefits of the Contractor under such obligations or commitments.

[fol. 66] (b) The Government shall reimburse the Contractor for all expenditures made in accordance with Article II and not previously reimbursed.

(c) If this contract is terminated for the convenience of the Government, the Government shall reimburse the Contractor for such further expenditures after the date of termination for the protection of Government property and for accounting services in connection with the settlement of this contract as the Contracting Officer may approve.

(d) The Government shall pay to the Contractor any unpaid balance for the rental of the Contractor's equipment in accordance with Article II to the date of termination, and if any of the Contractor's equipment is retained by the Government under the provisions of this article, additional compensation therefor shall be paid in accordance with Article II, either by purchase or rental at the election of the Contracting Officer.

(e) The obligation of the Government to make any of the payments required by this article, or by paragraph 3, Article III of this contract, shall be subject to any unsettled claims for labor or material or any claim the Government may have against the Contractor.

Article VII—Preference for domestic articles.

1. In the performance of the work covered by this contract the Contractor, subcontractors, materialmen or suppliers, shall use only such manufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States. The foregoing provision shall not apply to such articles, materials, or supplies of the class or kind to be used or such articles, materials, or supplies from which they are manufactured, as are not mined, produced or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials, or supplies as may be expected by the head of the department under the proviso of title III, section 3, of the Act of March 3, 1933, 47 Stat. 1520 (U. S. Code, title 41, section 10b).

2. Inasmuch as the materials listed below or the materials from which they are made are not mined, produced, or manufactured, as the case may be, in the United States [fol. 67] in sufficient and reasonably available commercial quantities and of satisfactory qualities, their use in the work herein specified is hereby authorized without regard to the country of origin:

Asbestos, balsa wood, China wood oil (Tung oil), chromium, cork, jute, kaurigum, lac, nickel, nickel alloy, (Monel metal), platinum, rubber, silk, sisal, teak wood, tin.

Articles, materials, or supplies made in the United States and containing mercury, antimony, tungsten, or mica of foreign origin may be used (subject to the requirements of applicable specifications) in the work herein specified, if such manufactured articles, materials, or supplies have been made in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States.

Article VIII—Convict labor.

The Contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

Article IX—Rates of wages—Nonrebate.

1. In accordance with the act of August 30, 1935 (49 Stat. 1011; 40 U. S. C. 276a and 276a-1), the following provision shall apply:

(a) The Contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at the time of payment, computed at wage rates not less than those established by the Secretary of Labor for the work herein specified, regardless of any contractual relationship which may be alleged to exist between the Contractor or subcontractor and such laborers and mechanics; and the scale of wages to be paid shall be posted by the Contractor in a prominent and easily accessible place at the site of the work. The Contracting Officer shall have the right to withhold from the Contractor so much of accrued payments as may be considered necessary by the Contracting Officer to pay to laborers and mechanics employed by the Contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the Contractor, subcontractors, or their agents.

(b) In the event it is found by the Contracting Officer that any laborer or mechanic employed by the Contractor [fol. 68] or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the

contract to be paid as aforesaid, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise and the Contractor shall be liable to the Government for any excess costs occasioned the Government thereby.

2. Should the Contractor or any subcontractor pay to any laborer or mechanic a wage based upon a rate in excess of the wage rate for the classification in which said laborer or mechanic is included as established for the work by the Secretary of Labor, such increased wage shall be at the expense of the Contractor and shall not be reimbursed by the United States. When, in connection with the audit and check by the Contracting Officer or his authorized representative, of the Contractor's pay rolls, prior to reimbursement as contemplated in paragraph 1, of article II hereof, it is found that one or more laborers and/or mechanics have been paid wages at rates in excess of the wage rates, established for such laborers and/or mechanics, the reimbursement made to the Contractor on account of such pay rolls will not include such excess payments. The provisions of this section shall not apply when wage rates for a particular classification greater than those prescribed by the Secretary of Labor have been approved in writing by the Contracting Officer who executed this contract or his successor.

3. The Contractor shall furnish to the Government representative in charge at the site of the work covered by this contract or if no Government representative is in charge at the site, shall mail to the Federal agency having control of the project, within 7 days after the payment of each and every weekly pay roll, an affidavit, in the form prescribed by regulations issued jointly by the Secretary of the Treasury and the Secretary of the Interior under date of January 8, 1935, or any modification thereof pursuant to the act of June 13, 1934 (48 Stat. 948; 40 U. S. C. 276b and 276c), sworn to the officer or employee of the Contractor supervising such payment to the effect that each and every person employed on the work has been paid in full the weekly wages shown on the pay roll covered by the affidavit; that no rebates, or deductions from any wages due such employee or employees not required by law have been made either directly or indirectly, and that to the best of

the knowledge and belief of the affiant no agreement or [fol. 69] understanding exists with any person employed on the project pursuant to which any person, directly or indirectly, by force, intimidation, threat, or otherwise, induces or receives any deductions or rebates in any manner whatever from any sum paid or to be paid any person for labor performed in carrying out this contract. At the time upon which the first affidavit with respect to wages said employees is filed the Contractor shall also furnish an affidavit executed by its president or a vice president, setting forth the name of the officer or employee who supervises the payment of employees and stating that such officer or employee is in a position to have full knowledge of the facts set forth in the affidavit respecting the payment of wages of employees. A similar affidavit shall be filed immediately in the event that a change is made in the officer or employee who supervises the payment of employees. The Contractor shall cause appropriate provisions to be inserted in all subcontracts relating to this work to insure fulfillment of the requirements of this article.

Article X—Workmen's compensation laws.

The act of June 25, 1936 (49 Stat. 1938, 1939; 40 U. S. C. 290), provides that the several States have authority to make their workmen's compensation laws applicable to contracts for the construction, alteration, or repair of a public building or public work of the United States, and the several States are vested with the power and authority to enforce such State laws on lands of the United States.

Article XI—Accident prevention.

The Contractor shall at all times exercise reasonable precautions for the safety of employees on the work and shall comply with all applicable provisions of Federal, local, State, and municipal safety laws and building construction codes.

Article XII—Officials not to benefit.

No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article XIII--Approval required.

This contract shall be subject to the written approval of The Secretary of War and shall not be binding until so approved.

Article XIV—Covenant against contingent fees.

The Contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement [fol. 70] for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or in its discretion, to deduct from payments due the Contractor the amount of such commission, percentage, brokerage, or contingent fee. This warranty shall not apply to commissions payable by Contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

Article XV—Disputes.

Except as otherwise specifically provided herein, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer, subject to written appeal by the Contractor within 30 days to the Chief of Branch, concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto, when the amount involved is \$15,000 or less. When the amount involved is more than \$15,000, the decision of the Chief of Branch shall be subject to written appeal within 30 days by the Contractor to the Secretary of War or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the Contractor shall diligently proceed with the work as directed.

Article XVI—Contractor's organization and methods.

Upon the execution of this contract the Contractor shall submit to the Contracting Officer a chart showing the executive and administrative personnel to be regularly assigned for full or part-time service in connection with the work under contract, together with a written statement of the duties of each person and the administrative procedure to be followed by the Contractor for the control and direction

of the work; and the data so furnished shall be supplemented as additional pertinent data become available. There shall also be submitted to the Contracting Officer by the Contractor charts of the various field organizations showing all personnel, other than artisans, mechanics, helpers, and laborers to be assigned for full or part-time service outside of the central-office organization, together with a written statement of the duties and rates of pay of each person and the procedure proposed to be allowed by the Contractor for the accomplishment of all field work, including temporary requirement; and the data so furnished shall be supplemented as additional pertinent data become available. Statements of procedure shall include purchasing, disbursing, accounting, transportation, storage, employment, housing, sanitation, subsistence, recreation and [fol. 71] similar essential activities and methods.

Article XVII—Definitions.

1. The term "Chief of Branch" refers to the head of a branch or bureau of the War Department, viz., the Quartermaster General, the Chief of Engineers, etc.

2. The term "his duly authorized representative" shall mean any person authorized by the Secretary of War or a chief of branch, as the case may be, to act for him, other than the Contracting Officer.

3. Except for the original signing of this contract, the term "Contracting Officer" as used herein shall include his duly appointed successor or his authorized representative.

Article XVIII—Alterations.

The following changes were made in this contract before it was signed by the parties hereto;

Changes are set forth in Appendix "B", attached hereto and made a part hereof.

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

The United States of America, by (s.) C. D. Hartman, Brig. Gen., QMC., Contracting Officer. Dunn Construction Company, Inc. (Contractor), by (s.) W. R. J. Dunn (Seal) and W. R. J. Dunn, President. John S. Hodgson and Company (Contractor), by John S. Hodgson, Partner, both of Birmingham, Alabama.

Approved September 12, 1940, by direction of the Secretary of War.

(s.) Robert P. Patterson, The Assistant Secretary of War.

Approved: September 10, 1940.

(s.) E. B. Gregory, Major General, The Quartermaster General.

Two Witnesses:-

(s.) Mary L. Biinte, 1325 Emerson St., N. E., Washington, D. C. (s.) O. P. Easterwood, Jr., 4200 Fourth St. North, Arlington, Va.

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, W. R. J. Dunn, who signed this contract for the Dunn Construction Company, Inc., had authority to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

(s.) C. D. Hartman, Brig. Gen., QMC. (contracting officer).

[fol. 72] Directions for Preparation of Contract

1. This form shall be used when authorized by the Secretary of War for formal contracts for the construction, alteration, or repair of buildings or works accomplished under the provisions of the law specifically authorizing the use of a cost-plus-a-fixed-fee contract.

2. There shall be no deviation from this approved contract form, except as provided for in these directions without approval of the Secretary of War or his duly authorized representative. Where interlineation, deletions, additions or alterations are authorized, specific notations of the same shall be entered in the blank space following the article entitled "Alterations" before signing. This article is not to be construed as general authority to deviate from the form. Deletion of the descriptive matter not applicable in the preamble need not be noted in the article entitled "Alterations".

3. All blank spaces on the title page must be filled in including a citation of the act or acts authorizing the contract. The Contracting Officer or his duly authorized

representative will sign the certificate of availability of funds appearing on the title page.

4. The blank space in the preamble is intended for the insertion of a statement of the work to be done, together with place of performance, or for the enumeration of papers which contain the necessary data.

5. The blank spaces in articles I and XIII must be filled in with the data indicated therein. The contract must be dated, and the performance and payment bonds, if required, must bear the same date.

6. Each appendix will contain a sufficiently descriptive statement to identify it with the contract viz:

Appendix "A"

to Contract No. —, dated —, between The United States of America and —, for the construction of —.

7. Contracts subject to approval are not valid until approved by the authority designated to approve them, and the Contractor's number will not be delivered, nor any distribution made, until such approval. All changes and deletions must have been made before the contract is forwarded for approval.

8. The number of executed copies and of certified copies, designation of disbursing officer, statement of appropriation, [fol. 73] amount of bond if required, as well as other administrative details, shall be as directed, by the Chief of Branch to which the contract pertains.

9. An Officer of a corporation, a member of a partnership, or an agent signing for the principal, shall place his signature and title after the word "By" under the name of the principal. A contract executed by an attorney or agent on behalf of the Contractor shall be accompanied by two authenticated copies of his power of attorney, or other evidence of his authority to act on behalf of the Contractor.

10. If the Contractor is a corporation, one of the certificates following the signature of the parties must be executed. If the contract is signed by the secretary of the corporation, then the first certificate must be executed by some other officer of the corporation under the corporate seal, or

the second certificate executed by the Contracting Officer. In lieu of either of the aforementioned certificates there may be attached to the contract copies of so much of the records of the corporation as will show the official character and authority of the officer signing, duly certified by the secretary or assistant secretary, under the corporate seal, to be true copies.

11. The full name and business address of the Contractor must be inserted and the contractor signed with his usual signature. Typewrite or print name under all signatures to contract or bonds.

12. Any provisions respecting labor or materials required by law to be included in this contract and any additional contract provisions deemed necessary for the particular work shall be made the subject of one or more additional articles or included in the specifications, appendix "A".

[fol. 74] STATE OF ALABAMA,

Jefferson County:

I, the undersigned, I. S. Hoffpauir, as secretary of the Dunn Construction Company, Inc., hereby certify that the following is an exact extract from the by-laws of said corporation:

"The President shall be the chief executive officer of the company, he shall preside at all meetings of the Directors and of the Stockholders; he shall have general and active management of the business of the company; shall see that all orders and resolutions of the Board of Directors are carried into effect; shall make and execute all contracts for or pertaining to construction work of any and every kind, without formal approval of the Directors, express authority to so make and execute such contracts being hereby conferred upon him, together with right to affix company seal thereto; shall execute all contracts and agreements otherwise authorized by the Board."

I further certify that W. R. J. Dunn is at this time and has been for many years President of the Dunn Construction Company, Inc.

(S.) I. S. Hoffpauir, Secretary. (Seal.)

Subscribed and sworn to before me this the 9 day of September, 1940. (S.) Jessica Ingram, Notary Public. Term expires Dec. 19, 1942. (Seal.)

Appendix "B"

To Contract No. W 6119 qm-161, dated September 9, 1940, between The United States of America and Dunn Construction Company, Inc., and John S. Hodgson and Company.

1. The following changes were made in the aforementioned contract before it was signed:

a. In Article II, Section 1 (c) lines 1, 2, and 3 the words "mentioned in the schedule of rental rates in Appendix "B", hereto attached and made a part hereof, except as hereinafter set forth", were deleted therefrom and in lieu thereof the following words were inserted: "approved by the Contracting Officer."

b. In Article II, Section 1 (d), the following phrase was inserted in line 1 between the words "unloading" and "of": "at the site of the work". There was also inserted in line 3 of said Article and Section between the words "work" [fol. 75] and "except" the phrase: "and return transportation f.o.b. cars to the point of original shipment or equivalent mileage".

c. In Article II, Section 2, lines 2 and 3, the words "mentioned in the schedule of rental rates hereto attached, except as hereinafter set forth" were deleted therefrom and in lieu thereof the following words were inserted: "approved by the Contracting Officer."

d. In Article IX, Section 2, the following sentence was added at the end thereof: "The provisions of this section shall not apply, when wage rates for a particular classification greater than those prescribed by the Secretary of Labor have been approved in writing by the Contracting Officer who executed this contract or his successor."

End of Appendix "B"

40/1392.

War Department, O. Q. M. C.

Change Order A

Authorization and approval of Wage Rates in Excess of Those Predetermined by the Secretary of Labor

Reference is made to Contract No. W 6119 qm-161 Dated 9/9/40 between the United States of America, signed for and in behalf thereof by C. D. Hartman, Brigadier General,

Quartermaster Corps, as Contracting Officer, and Dunn Construction Company, Inc., and John S. Hodgson & Co., Birmingham, Alabama, for the construction of a complete tent camp, including necessary buildings, structures, utilities and appurtenances thereto, at Fort McClellan, Alabama. It has been determined that in order to complete promptly and efficiently the work provided for thereunder, it is necessary that the Contractor and sub-contractor pay to laborers and mechanics a higher rate of wages than the predetermined minimum rates prescribed by the Secretary of Labor for classifications enumerated below.

Therefore, in accordance with Section 2, Article IX, as amended by Appendix "B", of the Contract, the Contracting Officer hereby approves as a reimbursable cost to the Contractor and Sub-Contractors, payment of the following rates of wages:

Classification	Rate
Asbestos Workers	\$1.25 per hr.
Asbestos Workers Helpers	.62 $\frac{1}{2}$ " "
Bricklayers	1.25 " "
Bricklayers Helpers	.50 " "
[fol. 76] Plumbers	1.25 per hr.
Plumbers apprentices	.62 $\frac{1}{2}$ " "
Rodmen	1.25 " "
Roofers, Composition	1.00 " "
Roofers Composition Kettlemen	.50 " "
Roofers, Composition Apprentices	.50 " "
Roofers, Slate & Title	1.25 " "
Sheet metal workers, Helpers	.50 " "
Structural Iron Works	1.50 " "
Common Laborers	.40 " "
Builders Laborers	.50 " "
Marble Masons, Slate & Structural Glass Workers	1.25 " "
Mosaic Terazo Workers	1.25 " "
Mosaic Terazo Workers	.60 " "
Sprinkler Fitters	1.25 " "
Sprinkler Fitters Helpers	.50 " "
Steam Fitters	1.25 " "
Steam Fitters Helpers	.62 $\frac{1}{2}$ " "
Stone Cutters	1.25 " "
Stone Masons	1.25 " "
Stone Masons helpers	.50 " "

Classification	Rate	
Tile Layers	1.25	per hr.
Tile Layers helpers	.50	" "
Waterproofers	1.25	" "
Watchmen	.40	" "
Waterboys	.40	" "
Painters & Decorators	1.00	" "
Plasterers	1.25	" "
Plasterers helpers & laborers	.50	" "
Carpenters	1.00	" "
Cement Finishers	1.25	" "
Electricians	1.25	" "
Electrician, Apprentices	.62½	" "
Elevator Constructors	1.50	" "
Glasiers	1.00	" "
Hodcarriers	.50	" "
Sheet Metal Workers	1.25	" "
Ornamental Iron Workers	1.50	" "
[fol. 77] Rodlayers, Reinforced	1.25	per hr.
Structural Iron Workers, Apprentices	.93	" "
Concrete Laborers	.40	" "
Lathers, Metal	1.00	" "
Lathers, Wood	1.00	" "
Marble Masons, Slate & Structural Glass		
Workers, helpers	.62½	" "
Operators of Powered Equipment:	1.37½	" "
Operators of two-drum equipment		
Operators of Heavy Duty Machines of over one yard capacity	1.50	" "
All other operators of powered equipment	1.25	" "
Oilers and Firemen	.75	" "
Mechanics for Complex Equipment	1.50	" "

By direction of the Contracting Officer. (S.) E. E.
Kirkpatrick, Capt. Q. M. C.

Date, September 30, 1940.

Authenticated Copies:

1 to C. Q. M.

1 To Disbursing Officer

1 To Contracting Officer

1 To Legal Section

1 To Fixed Fee Section

1 To Adm. Sec. O. Q. M. G. (Lab. Rel.)

Executed numbers:

1 To C. Q. M. for contractor

2 To Legal Section

(See AR 5—200, par. 15 & 19)

War Department, O. Q. M. G.

Change Order B

Authorization and approval of Wage Rates in Excess of
Those Predetermined by the Secretary of Labor

Reference is made to Contract No. W 6119 qm-161 Dated 9/9/40 between the United States of America, signed for and in behalf thereof by C. D. Hartmen, Brigadier General, Quartermaster Corps, as Contracting Officer, and Dunn Construction Co., Inc., and John S. Hodgson & Company, Birmingham, Alabama, for the construction of a complete tent camp, including necessary buildings, structures, utilities and appurtenances thereto at Fort McClellan, Alabama. It has been determined that in order to complete promptly and efficiently the work provided for thereunder, it is necessary that the Contractor and Sub-Contractor pay to laborers and mechanics a higher rate of wages than the predetermined minimum rates prescribed by the Secretary of Labor for classifications enumerated below.

[fol. 78] Therefore, in accordance with Section 2, Article IX, as amended by Appendix "B", of the Contract, the Contracting Officer hereby approves as a reimbursable cost to the Contractor and Sub-Contractors, payment of the following rates of wages:

Classification	Rate		
Asbestos workers	\$1.25	per	hr.
Asbestos workers Helpers	.62½	"	"
Blacksmiths	1.00	"	"
Asphalt rakers, tampers and smoothers	.60	"	"
Bricklayers	1.25	"	"
Carpenters, journeymen	1.00	"	"
Carpenters, apprentices: 1st year	.60	"	"
2nd year	.70	"	"
3rd year	.80	"	"
4th year	.90	"	"
Cement finishers	1.25	"	"
Electricians	1.25	"	"

Classification	Rate		
Steam fitters helpers	.62 $\frac{1}{2}$	"	"
Structural-iron workers	1.50	"	"
Trackmen	.50	"	"
Truck drivers	.50	"	"
Well drillers	1.00	"	"
Well drillers helpers	.75	"	"
Boilermakers	1.00	"	"

Date November 7, 1940. By direction of the Contracting Officer.

(S.) E. E. Kirkpatrick, Capt. Q. M. C.

Authenticated copies:

- 1 To C. Q. M.
- 1 To Disbursing Officer.
- 1 To Contracting Officer.
- 1 To Legal Section.
- 1 To Fixed Fee Section.
- 1 To Adm. Sec. O. Q. M. G. (Lab. Rel.).

Executed numbers:

- 1 To C. Q. M. for contractor.
 - 2 To Legal Section. (See Ar. 5—200, par. 15 & 19).
- Filed in office May 16, 1941.

[fol. 80] EXHIBIT "2" TO AGREED STATEMENT OF FACTS

Dunn Construction Co., Inc.

and

John S. Hodgson & Company

Request No. 3618

Request for Purchase

Date 1-16-41

To: Purchasing Agent.

It is requested that the following be purchased for use as indicated:

Approved.....

Signed Thos. G. Walmsley
Title By: W. A. Morgan

Item No.	Quantity	Unit	Article (Complete Description)	Purchase No.	Bids Received		
					1	2	3
					Price	Price	Price
1	8	Pcs.	4"x10"—16' #1 dense Pine Lumber 427 BF	1-3211			
2	4	"	" " 14' #1 dense Pine Lumber 186				
3	1	"	" " 12' #1 dense Pine Lumber 40				
4	2	"	" " 10' #1 dense Pine Lumber 67				
5	2	"	4"x12"—24' #1 dense Pine Lumber 192				
6	3	"	" " 18' #1 dense Pine Lumber 216				
7	2	"	" " 16' #1 dense Pine Lumber 128				
8	2	"	" " 14' #1 dense Pine Lumber 112				

1368 BF

Items 1 thru 4 dressed 3-5/8"x9"

Items 5 thru 8 dressed 3-5/8"x11 1/2"

Certified a true copy

1.368 MBF @ \$50.00

\$68.40

Thomas H. Doyle, Captain, QMC

Deliver to Cold Storage Plant
For Trolley System

Confirmation

1/4 of 1%—10 days

Bidders

Name	Address	How Taken	Awarded Item Nos.	Bid No.
King & Boozer	Anniston, Alabama		All	
Approved for purchase			Issue purchase orders as indicated above.	
(s) Thomas H. Doyle, Capt. Q.M.C.	Constructing Quartermaster	(s) Raymond P. Reeves,	Purchasing Agent	
For: S. C. MacIntire, Jr.,	Major, Q.M.C.			

[fol. 81] EXHIBIT "3" TO AGREED STATEMENT OF FACTS

DUNN CONSTRUCTION CO., INC.
and
JOHN S. HODGSON & COMPANY
Contractors

Fort McClellan, Ala.

Purchase Order No. 2565

Req. No. 3618. This Number Must Appear on all Invoices.

Date January 17, 1941.

To King & Boozer
Address

Please enter the following order in accordance with the conditions and terms of your accepted bid and/or contract dated — and in conformity with conditions and instructions on the reverse side hereof.

Quantity							Price	Amount
1	9 pcs.	4"x10"—16'	#1 Dense Pine Lumber			427 BF		
2	4 "	" —14'	" "	"	"	186		
3	1 "	" —12'	" "	"	"	40		
4	2 "	" —10'	" "	"	"	67		
5	2 "	4"x12"—24'	" "	"	"	192		
6	3 "	" —18'	" "	"	"	216		
7	2 "	" —16'	" "	"	"			
8	2 "	" —14'	" "	"	"	112		
1. 368 MBF							1368 BF	\$50.00 68.40
Items 1 thru 4 dressed 3-5/8"x9"							Total	\$68.40
Items 5 thru 8 dressed 3-5/8"x112"								

Certified a True Copy. Thomas H. Doyle, Captain QMC

Ship To: United States Construction Quartermaster
At: Fort McClellan, Ala.

For account of Dunn Construction Co., Inc., and John S. Hodgson & Co.

Ship by Best Way Via—F.O.B. Fort McClellan, Alabama.
Terms: Net—Days, Less ¼ of 1% Days. Shipments Must
Start by — And be completed by —? Mark Packages, Cases,
Etc. with above purchase order Number, Special Number

of each package, weight of each package, vendor's name, and the following special markings —

Important: See reverse side of this sheet

Dunn Construction Co., Inc., and John S. Hodgson
& Co. (S.) Raymond P. Reeves, Purchasing Agent.

(Reverse side of above sheet)

This order is placed for the benefit of, and is assignable to, the United States Government.

This Purchase Order does not bind, nor purport to bind, the United States Government or Government officers thereunder.

Terms of Payment: as stated on obverse side of this Purchase Order are understood to be effective upon arrival at destination and acceptance of material by properly accredited U. S. Government officers or representatives having jurisdiction over same, and of properly executed Bills [fol. 82] of Lading (or shipping papers) and receipt of certified invoice.

The following Instructions must be followed Explicitly:

1. Acknowledge receipt of This Purchase Order. Unless acknowledged immediately we reserve the right to cancel.

2. Immediately upon shipment mail to Dunn Construction Co., Inc., and John S. Hodgson & Co., at Fort McClellan, Ala:

A. Original and Two (2) copies of Bill of Lading (or shipping papers).

Bills of Lading, etc., must read:

United States Construction Quartermaster at Fort McClellan, Ala.

Account of Dunn Construction Co., Inc., and John S. Hodgson & Company.

and must also bear Purchase Order Number.

B. Six (6) copies of invoice, properly filled and certified as follows:

I certify that the above bill is correct and just; that payment therefor has not been received; and that except as noted below or otherwise indicated herein all unmanufactured

tured articles, materials, or supplies furnished under this invoice have been mined or produced in the United States and all manufactured articles, materials, or supplies have been manufactures in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States; and that State or local sales taxes are not included in the amounts billed.

3. Render Separate invoices for Each and Every shipment.

4. Make No Changes in filling this Purchase Order as to quantities, descriptions, prices, f. o. b. points, etc., except upon direct authority from our Purchasing Department.

5. Immediately upon shipping mail to the contractor 3 copies of tally and shipping memo; enclose tally or shipping memo in each package, or tack same inside each car door.

6. Mark Vendor's name and Purchase Order Number on all tallies or memos.

Full Compliance With the Above Will Expedite Payment

[fol. 93] EXHIBIT "4" TO AGREED STATEMENT OF FACTS

Receiving and Inspection Report.

Date received 1-16 194— Via Truck
Vendor King-Boozer Shipped From Anniston, Alabama.
CRR No. 03872

Articles Inspected, Accepted and Received.

Location	Quantity	Unit	Description	Talley Space
	8	Pcs.	4x10—16' Net 3-5/8x9 D4S	
	4	"	" 14' " " "	
	1	"	" 12' " " "	
	2	"	" 10' " " "	

Certified a true copy
Thomas H. Doyle, Captain, QMC

Received by /s/ E. C. Overton
/s/ J. F. Thompson

P. O. No. 2565 Date 1-17 1941 Checked by H
Invoice No. 6670 " 1-17 1941 " " H

EXHIBIT "4A" TO AGREED STATEMENT OF FACTS

Dunn Construction Co., Inc., and John S. Hodgson & Co.
Receiving and Inspection Report.

Date received 1-16-41

Vendor—King-Boozer

Shipped from Anniston, Ala.

Delivered To. (A) Area Site Cold Storage

Articles Inspected, Accepted and Received.

Location	Quantity	Unit	Description	Talley Space
	8	Pcs.	4x10—16	D4S
	4	"	4x10—14	"
	1	"	4x10—12	"
	2	"	4x10—10	"

Certified a true copy

Thomas H. Doyle, Captain, QMC

Received By /s/ E. C. Overton

Inspected by /s/ J. F. Thompson

P. O. No. 1663

[fol. 84] EXHIBIT "5" TO AGREED STATEMENT OF FACTS

Original

King & Boozer,
Anniston, Alabama

Invoice No. 6670

Entered Page 47

By Line 16

L

Customers Ordo No. 2565

Invoice No. 446

Requisition No. 3618

Invoice Date—Jan. 17, 1940

Sold to—U. S. Construction Quartermaster.

U. S. Army.

% Dunn Constr. Company.

& John S. Hodgson & Company.

Fort McClellan, Alabama.

Ship to and

Destination—Same as per tickets attached.

Quantity	Items	Weight	Price	Amount
8 pcs.	4x10—16' #1 Dense Pine Lumber	427'		
4 pcs.	" —14 " " " "	186		
1 pc	" —12 " " " "	40		
2 pcs	" —10 " " " "	67		
2 pcs	4x12—24 " " " "	192		
3 pcs	" —18 " " " "	216		
2 pcs.	" —16 " " " "	128		
2 pcs	" —14 " " " "	112		

(Tickets : 03872—73)

1368' \$50.00 \$68.40

Less ¼ of 1% Discount .17

Net Amount Paid \$68.23

I certify that the above bill is correct and just; that payment therefor has not been received and that except as noted below or otherwise indicated herein all manufactured articles, materials, or supplies furnished under this invoice have been mined or produced in the United States and all manufactured articles, materials or supplies have been manufactured in the United States, substantially all from articles, materials or supplies mined, produced or manufactured, as the case may be, in the United States; and that State or local sales taxes are not included in the amounts billed.

Firm name: King & Boozer

By Y. C. King, Partner

Certified a true copy.

Thomas H. Doyle, Captain, QMC

Calculations Checked By H

P. O. No. 2565

Purpose No. 3211 Amt 68.23

QM-7612

Certified Correct

J. P. Anderson, Chief Fiscal Accountant.

[fol. 85] EXHIBIT "6" TO AGREED STATEMENT OF FACTS

Dunn Construction Co., Inc.

and

John S. Hodgson & Company

No. 43

Invoice Transmittal

Date January 21, 1941.

To: Constructing Quartermaster

Attention of Field Auditor

The following Invoices are submitted for approval of payment:

In-voice No.	Date	P. O. No.	QM 7612 Vendor	Amount	Date Approved
6626	1-13-41	2531	Moore-Handley Hardware Co.	24.15	Jan. 30, 1941
6627	1-13-41	2529	" " " "	12.33	Jan. 30 1941
6629	1-13-41	2530	" " " "	33.76	Jan. 30 1941
6672	1-13-41	2534	" " " "	4.37	Jan. 29 1941
6673	1-13-41	2550	" " " "	1.80	Jan. 29 1941
6674	1-13-41	2534	" " " "	4.50	Jan. 29 1941
6675	1-13-41	2549	" " " "	202.21	Jan. 30 1941
6676	1-13-41	2534	" " " "	4.25	Jan. 29 1941
6677	1-13-41	2549	" " " "	103.95	Jan. 29 1941
6678	1-15-41	2550	" " " "	18.00	Jan. 30 1941
6679	1-15-41	2549	" " " "	558.33	Jan. 29 1941
6680	1-16-41	2531	" " " "	16.10	Jan. 29 1941
5052	11-20-40	1871	Dalrymple Equipment Co.	59.30	Returned
6575	1-10-41	2503	" " " "	7.10	Jan. 30 1941
6611	1-10-41	2501	" " " "	12.64	Jan. 30 1941
6619	1-10-41	2502	" " " "	8.45	Jan. 30 1941
6612	1-10-41	2501	" " " "	327.14	Jan. 30 1941
6614	1-10-41	2503	" " " "	437.74	Jan. 30 1941
6615	1-10-41	2502	" " " "	27.00	Jan. 30 1941
6616	1-10-41	2502	" " " "	14.36	Jan. 30 1941
6617	1-10-41	2502	" " " "	225.52	Jan. 30 1941
6618	1-10-41	2503	" " " "	15.27	Jan. 30 1941
6464	12-30-40	1432	Morse Boulger Destructor Co.	5,520.00	Jan. 30 1941
6641	1-14-41	2523	Wimberly & Thomas Hardware Co.	27.30	Jan. 29 1941
6642	1-10-41	2500	The Young & Vann Supply Co.	24.34	Jan. 29 1941
6656	12-9-40	2535	Ed. Gantt Machinery Company	8.56	Jan. 30 1941
6670	1-17-41	2565	King & Booser	68.40	Jan. 29 1941

Certified a true copy.

Thomas H. Doyle, Captain, QMC.

Entered by WJW

JLH

Total

7,766.86

Received the above Invoices

Previous Totals ac-

455,585.91

cumulated

Accumulated Totals
to Date

463,352.77

Constructing Quartermaster

Dunn Construction Co., Inc.

and

By /s/ W. H. Horton, Jr.

John S. Hodgson & Co.

Field Auditor

By /s/ J. P. Anderson

[fol. 86] EXHIBIT "7" TO AGREED STATEMENT OF FACTS

Office of
Constructing Quartermaster
Fort McClellan, Ala.

Invoices Approved.

To: Dunn Construction Co., Inc.

Date

January 29, 1941.

and
John S. Hodgson & Co.

The following Invoices are approved for payment:

Invoice No.	Date	Vendor	Original Amount	Dis- count	Approved Amount
6679	1-15-41	Moore-Handley Hardware Co.	558.33	11.17	547.16
6677	1-13-41	" " " " (Inc	103.95	2.08	101.87
6641	1-13-41	Wimberly & Thomas Hardware Co./	27.30		27.30
6642	1-10-41	The Young & Vann Supply Co.	24.34	.49	23.85
6639	1-11-41	Robert P. Stapp	67.50	1.35	66.15
6638	1-11-41	" " " "	71.00	1.42	69.58
6654	1-15-41	Stephens Printing Company	7.50	.15	7.35
6674	1-13-41	Moore-Handley Hardware Co.	4.50	.09	4.41
6676	1-13-41	Moore-Handley Hardware Co.	4.25	.08	4.17
6672	1-13-41	" " " "	4.37	.09	4.28
6680	1-16-41	" " " "	16.10	.16	15.94
6489	12-30-40	J. D. Pittman Tractor Co., Inc.	11.83		11.83
6673	1-13-41	Moore-Handley Hardware Co.	1.80	.04	1.76
6628	1-13-41	" " " "	262.62	1.31	261.31
6640	1-13-41	Robert P. Stapp	29.80	.60	29.20
6637	1-11-41	" " " "	171.50	3.43	168.07
6636	1- 8-41	" " " "	91.95	1.84	90.11
6624	12-26-40	Ed Gantt Machinery Co., Inc.	47.00		47.00
6255	12-24-40	The Young & Vann Supply Co.	37.20	.74	36.46
6128	12-16-40	Noland Company, Inc.	42.50	.85	41.65
6631	1-13-41	Moore-Handley Hardware Co.	30.00	.60	29.40
6610	1- 8-41	Barbor-Greene Co.	172.15	3.44	168.71
6646	12-14-40	Addressograph	5.25		5.25
6338	12-28-40	Moore-Handley Hardware Co.	28.80	.58	28.22
6336	12-27-40	" " " "	21.60	.43	21.17
6634	12-29-40	J. D. Pittman Tractor Co., Inc.	105.68		105.68
6635	12-29-40	J. D. Pittman Tractor Co., Inc.	1.60		1.60
5762	12-10-40	Virginia Steel Company, Inc.	300.00	1.50	298.50
6196	12-14-40	" " " "	1,991.00	9.95	1,981.05
6609	1- 6-41	Adams-McCargo Motor Company	6.19		6.19
6670	1-17-41	King & Boozer	68.40	.17	68.23
6655	1-14-41	Alabama Pipe Company	215.60	4.31	211.29
5602	12- 4-40	Noland Company, Inc.	3.30	.07	3.23
6172	12-17-40	Noland Company, Inc.	6.10	.12	5.98
6582	1-13-41	Moore-Handley Hardware Co.	27.50	.55	26.95

4,568.51 47.61

Certified a true copy

Mar. 1, 1941

Thomas H. Hoyle, Captain, QMC

Entered E. H. J.

Received the above Invoices

Totals

4,520.90

Dunn Construction Co., Inc.

Previous Totals Accumulated

426,981.29

and

Accumulated Totals to Date

431,502.19

John S. Hodgson & Co.

Constructing Quartermaster

By H. A. Gholson

By /s/ E. D. Proctor

Field Auditor

[fol. 87] EXHIBIT "8" TO AGREED STATEMENT OF FACTS

PUBLIC VOUCHER FOR PURCHASES AND SERVICES OTHER THAN
PERSONAL

U. S. War Department Voucher No. 515

Voucher prepared at Fort McClellan, Ala., 2-3-41
The United States, Dr.

To Dunn Construction Co., Inc. & John S. Hodgson & Co.
Address Fort McClellan, Alabama

Articles or Services

Balance brought forward	1,991.62
Total	1,991.62

I hereby certify that the above bill is correct and just; that payment therefor has not been received; and that except as otherwise noted of all articles, materials, and supplies furnished under purchase order No. — if unmanufactured articles, materials, and supplies, have been mined or produced in the United States, and if manufactured articles, materials, and supplies, they have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States; and that State or local sales taxes are not included in the amounts billed.

Payee Dunn Construction Co., Inc. & John S. Hodgson & Co. Per /S/ E. A. Goshen, Title Chief Accountant.

Contract No. W-6119 Qm-161. Date 9-9-40.

Pursuant to authority vested in me, I certify that the above articles were received in good condition, after due inspection, acceptance and delivery prior to payment as required by law, or the services were performed as stated; that they were procured under the contract numbered above or the unnumbered contract attached hereto, or that they were procured without written contract, in open market, and with or without advertising, under the circumstances stated in No. — of "Method of or Absence of Advertising" shown on reverse hereof and were necessary for the

public service; and that the prices charged are just and reasonable and in accordance with the agreement.

Approved for \$1,991.62.

/S/ S. C. MacIntyre, Jr., Major, QMC., Constructing Quartermaster.

/S/ E. D. Procter, Field Auditor.

[fol. 88]

Accounting Classification

Appropriation, limitation, or project symbol 21X0640.063.

Limit'n or Proj't Amount 1,991.62.

Appropriation Amount 1,991.62.

Construction of Buildings, Utilities and Appurtenances at Military Posts. Emergency construction. No Year. (See Form 35-A attached).

Certified a True Copy

Thomas H. Doyle, Captain, Q.M.C.

Public Voucher for Purchases, and Services other than Personal

Continuation Sheet

U. S. War Department Sheet No. 2 of Bureau Voucher No. —.

No. and Date of order.	Articles or Services	Amount
------------------------	----------------------	--------

Our Invoice No.

5139	Robert P. Stapp	28.40
5146	Ceco Steel Products Corporation	165.07
5344	Moore-Handley Hardware Co.	8.82
5876	W. S. Darly & Co.	1.61
5964	Moore-Handley Hardware Co.	207.76
5761	Virginia Steel Company	69.65
5977	Virginia Steel Company	690.50
6179	Geo. F. Shoelock Co.	2.72
6188	The Southern Oil Equipment Com- pany	137.59
6214	W. S. Dickey Clay Mfg. Co.	32.01
6250	O. K. Tire & Radiator Shop	12.50
6495	C. S. Sawyer	192.80

No. and Date of order.	Articles or Services	Amount
------------------------	----------------------	--------

Our Invoice No.

6496	C. S. Sawyer	69.30
6556	Moore-Handley Hardware Co.	46.40
6574	W. S. Dickey Clay Mfg. Co.	14.72
6609	Adams-McCargo Motor Company	6.19
6655	Alabama Pipe Company	211.29
6670	King & Boozer	68.23

Certified & True Copy.

Thomas H. Doyle, Captain, Q.C.-Res.

[fol. 89]

Analysis of Vouchers

Appropriation Title

2LX0540.068 Construction of Buildings, Utilities and Appurtenances at Military Post. Emergency Construction.
No Year.

QM-7612	PI-3211	0540.068M	1,023.22
QM-7612	PI-3212	0540.068M	88.97
QM-7612	PI-3213	0540.068M	879.43
			1,991.62

Certified a true copy.

Captain Thomas H. Doyle, Captain QC-Res.

[fol. 90] IN CIRCUIT COURT OF MONTGOMERY COUNTY

Statement of Evidence

MAJOR S. C. MACINTIRE, JR., being first duly sworn, testified as follows:

Direct Examination.

By Mr. Mickey:

Q. Will you state your name, please?

A. S. C. MacIntire.

Q. Your age, please, sir?

A. Fifty-one.

Q. Your present residence?

A. Decatur, Georgia.

Q. Your present occupation?

A. Soldier.

Q. With what part of the Army are you connected?

A. Quartermaster Corps.

Q. How long have you been with the Quartermaster Corps?

A. Since last August.

Q. What capacity do you hold with the Quartermaster Corps?

A. You mean rank, or do you mean——

Q. (Interposing): Job.

Mr. Green: Rank and duties.

Q. Rank and duties?

A. I was assigned to Constructing Quartermaster, as a Major. This just covers this present active-duty period, see?

Q. You are Constructing Quartermaster on what job?

A. Now?

Q. Then?

A. Fort McClellan.

Q. Did you know Mr. John Hodgson?

A. Yes.

Q. Did you deal directly with him while you were Constructing Quartermaster at Fort McClellan in connection with the performance of this contract which Dunn Construction Company, Incorporated, and John S. Hodgson & Company had with the Government for the construction of a tent camp and other buildings at Fort McClellan?

A. Yes.

Q. I hand you a document marked Exhibit A and ask you if you have ever seen that document, or a copy of it, before?

A. Yes. This is the guide and instructions to Constructing Quartermasters covering fixed-fee project operation.

[fol. 91] Q. How did you come into possession of this?

A. It was forwarded to me by the Quartermaster General's office in Washington, for distribution on the job.

Q. By whom was it prepared and issued?

A. Issued by the Quartermaster General in the Construction Division. And it came to my office—those forms came to my office, I believe either five or six copies; and we

were instructed to distribute them to the contractor and to the architect-engineer, so we were all conversant with the instructions.

Q. Did you deliver one of the copies to the constructing contractors on the job at Fort McClellan?

A. Yes; to the contractors and to the engineers, both.

Q. Did you, in your capacity as Constructing Quartermaster, follow the directions and procedures which are set forth in this "Supplement to Guide for Constructing Quartermasters"?

A. I believe—

Mr. Lapsley (interposing): Your honor—

The Court: Hold just a second. What is the ground of objection?

Mr. Lapsley: We object to that question specially on the ground that it calls for incompetent, irrelevant and immaterial testimony, conclusion of the witness—

The Court (interposing): Can you out-talk that fan just a little bit?

Mr. Lapsley: Incompetent, irrelevant, immaterial, and calls for a conclusion of the witness; and, further, that it calls for evidence which is not pertinent to any issue in this case; and, another ground, that it is an attempt to alter or vary the terms of a written contract, by parol.

The Court: I will let it in and give you an exception to the Court's ruling. Now you can answer it.

Witness: Do I—

The Court: You can answer now.

Witness: Answer the question?

The Court: Yes.

A. Well, as nearly as it was possible to follow this, but the Constructing Quartermaster is given discretionary powers in certain things to make routine decisions, which I exercised in many cases.

Q. But that power of discretion that you exercised is given you in these instructions?

A. That's right. The authority is in there. I didn't have to run to Washington with every decision that I made.

[fol. 92] Q. How long did the instructions that are set forth in this Guide remain in force and effect?

A. Well, now, that leads me off on what I was trying to say: That was in effect until these came out, but I didn't

want the impression to go into the record that there were no other instructions that came out in the interim.

Q. What other instructions came out in the interim?

A. Well, it is continuous. These Construction Division letters come out continuously, probably a dozen a week or more, and they are in some cases instructions on things that have nothing to do with the manual; but, however, I didn't want you to get it in the record that stopped everything until this came out. You see, there's also zone letters that come out, that are instructions, as things develop.

Q. The instructions that you say came out from time to time were all incidental in nature?

A. Oh, yes; or they could have been on lump-sum contractors, or anything.

Q. But they did not change substantially the procedures—

A. (interposing): Not at all. Not at all, no. But you see in your original question to me you asked me apparently whether there was a gap of any kind between these two, and there was.

Q. When was the new Manual for the Construction Division, Office of the Quartermaster, with instructions to Constructing Quartermasters, issued?

A. It was issued under the date of March 19, 1941.

Mr. Mickey: I offer in evidence Exhibit A, entitled "Supplement to Guide for Constructing Quartermasters, revised 1940, covering fixed fee projects", dated August 27, 1940.

Mr. Lapsley: We wish to object to the introduction of this document.

The Court: Why don't you do this: Follow this rule: Unless you specially object—

Mr. Lapsley (interposing): I will put my grounds in.

The Court: Yes, put your grounds in, and any other grounds, if you don't assign any.

Mr. Green: It will stand on that same objection. The objection shows it relates to all of them.

The Court: Well, it is in.

Mr. Thornton: Judge, did we understand you overrule the objection?

The Court: Yes.

Q. Major MacIntire, I hand you a document marked Ex-[fol. 93] hibit B, entitled "Fixed Fee Letter No. 5", and ask you if you have ever seen that letter, or a copy of that letter, before?

A. Yes. This is a circular letter that came out to all Constructing Quartermasters.

Q. From whom?

A. From the office of the Quartermaster General, and it is signed by Captain Kirkpatrick, who was at that time an assistant in the Fixed Fee Section.

Q. This is an illustration of the type of letter which you say came out——

A. (interposing): That's correct.

Q. (continuing): —in addition to the——

A. (interposing): That's correct.

Q. (continuing): —instructions in the Guide. Approximately when did that document reach you? When did you receive a copy of that?

A. Well, it would be difficult for me to fix the date. I'm surprised that this isn't dated.

Q. Approximately?

A. Well, I would say it must have come out in October. About October of 1940.

Q. Did you receive copies of that which were transmitted by you to Dunn Construction Company, Incorporated, and John S. Hodgson & Company, in your capacity as Constructing Quartermaster?

A. I can't answer that question, because I don't know. The procedure would have been, yes. But whether that was actually delivered, I have no way of knowing. I have no receipt for them.

Q. But in the usual course of routine, you would have received copies of that——

Mr. Green: He answered that question. He said yes, he would have in normal course delivered it.

Witness: Yes.

Mr. Mickey: I offer in evidence Exhibit B.

Mr. Lapsley: You got a B on it?

The Court: Yes.

Mr. Thornton: We object to it. Reserve the right to assign grounds.

The Court: Yes. Same ruling and same exception.

Q. I show you exhibit marked Exhibit C, entitled "Construction Division Letter No. 101", dated February 19, 1941——

A. (interposing): That's correct, yes.

[fol. 94] Q. (continuing): — and ask you if that is a copy of letter you received from the office of the Quartermaster General in Washington, D. C. 5

A. That's correct.

Q. In your capacity as Constructing Quartermaster and——

A. (interposing): May I interrupt? I wasn't at Fort McClellan when this letter was received. I received this letter in Atlanta at my present assignment. You see, I reported there the 18th of February. This is the 19th of February.

Q. This is a general letter which you would have received?

A. That's right. You see, this went to all Constructing Quartermasters. You see, Captain Doyle was there when he got that. He relieved (witness stopped).

Mr. Green: Have you any questions, Mr. Lapsley?

Mr. Lapsley: No.

Witness excused.

CAPTAIN THOMAS H. DOYLE, being first duly sworn, testified as follows:

Direct examination.

By Mr. Mickey:

Q. Will you state your name, please?

A. Thomas H. Doyle.

Q. You are at present Constructing Quartermaster at Fort McClellan?

A. Yes.

Q. Have you ever seen a copy of this document, marked Exhibit C?

A. Yes.

Q. Have you applied the instructions and directions given to Constructing Quartermasters thereby at Fort McClellan?

Mr. Lapsley: We object to that.

Mr. Green: And to—wait; let him finish the question. and——

Q. And to Dunn Construction Company, Incorporated, and John S. Hodgson & Company?

A. Yes.

Mr. Lapsley: We object to that.

The Court: Yes. Same ruling. Same thing.

Mr. Green: Now introduce it in evidence.

[fol. 95] Mr. Mickey: I offer Exhibit C in evidence.

Mr. Green: That's all, Captain.

Mr. Thornton: And we have an exception. We object.

The Court: Yes.

Mr. Thornton: We object, with leave to assign all grounds applicable.

The Court: Oh, yes.

Witness excused.

MR. JOHN S. HODGSON, being first duly sworn, testified as follows:

Direct examination.

By Mr. Mickey:

Q. You are John S. Hodgson, aged thirty-eight, one of the partners of John S. Hodgson & Company, which is associated with Dunn Construction Company, Incorporated, as a partner, or co-venturer, in a contract dated September 9, 1940, a copy of which is attached to the petition for a declaratory judgment filed in this case?

A. Yes.

By Mr. Green:

Q. In the course of the performance by Dunn Construction Company and John S. Hodgson & Company of that contract, did you, in the behalf of the co-venture, receive, through the Constructing Quartermaster on duty at that Post, copies of the documents which I hand to you, and which are marked, respectively Exhibit A, Exhibit B, and Exhibit C?

A. Yes.

Mr. Mickey: That's all.

Mr. Green: Wait a minute. No, it is not all.

Q. Why were these documents, if you know, delivered to you by the Constructing Quartermaster?

Mr. Lapsley: We object to that.

Mr. Green: Understand that. Understand that.

Mr. Thornton: We object to that, with leave to assign grounds—is that the same agreement—

The Court: Yes. Same rule.

Mr. Thornton: All right. With leave to assign grounds. [fol. 96] The Court: Any additional grounds you want. All right. You can answer.

A. Because they pertain to the operation of this contract.

Q. Whose operation?

A. They pertain to the operation of the Constructing Quartermaster, the engineers, and the contractors.

Q. And by contractor you mean particularly to the co-venture of Dunn Construction Company, Incorporated, and John S. Hodgson & Company, in the performance of its contract of September 9, 1940, which has been mentioned above?

A. Yes, sir.

Q. Did you apply the instructions contained in those several exhibits to your operations, in the performance of your contract?

Mr. Lapsley: We object.

The Court: Same ruling. Let it in, and you have an exception.

A. We did.

Q. I hand you what purports to be—I hand you a photostatic copy of what purports to be a conference held with the Dunn Construction Company and John S. Hodgson & Company in Room 2241, Munitions Building, Washington, D. C., on September 6, 1940, between Mr. Dunn and yourself, and Lieutenant-Colonel E. G. Thomas and Mr. Loving and Mr. O'Brien, all representing the Government, relative to the construction of Camp McClellan, Alabama, and ask you if you have ever seen—if that is a true copy of any paper which you have ever seen?

Mr. Lapsley: Now, we object to that question.

The Court: Overrule it and give you an exception. I presume it is a true copy?

A. I haven't read it in detail, but I remember the conference.

The Court: So far as you know—

Witness (interposing): In my opinion, it is a true copy.

Q. In your opinion, it is a true copy of that conference?

A. Yes, sir.

Q. You know why the conference was held?

Mr. Lapsley: We object to that.

The Court: "Know *why* the conference was held"?

Mr. Green: Yes, sir.

The Court: Overrule and let it in, and give you (Mr. Lapsley) an exception.

A. For the purpose of discussing a proposed contract for the construction of the camp at Camp McClellan.

[fol. 97] Q. And by that proposed contract, you mean a proposed contract to be entered into by Dunn Construction Company and John S. Hodgson & Company with the United States?

A. Yes, sir.

Q. Was such a contract consummated pursuant to this conference?

Mr. Lapsley: We object.

The Court: Overrule, and give you an exception.

A. It was.

Q. Is that the contract which you have seen filed in this case as an exhibit attached to the petition for a declaratory judgment, filed in your name and in the name of the United States?

A. Yes, sir.

Mr. Green: We introduce this in evidence and mark it Exhibit D.

Mr. Lapsley: And we object to the introduction of this, on like grounds, and everything—

The Court (interposing): Yes.

Cross-examination.

By Mr. Lapsley:

Q. I want to ask you, Mr. Hodgson, as nearly as you can state, when did you receive copies of the papers referred to and marked as Exhibits A, B and C?

A. During the course of construction. The first of these began coming out immediately after the job started, and the letters—at different times during pretty—at pretty regular intervals throughout construction.

Q. You mean after you had signed the contract and started to perform this work?

A. Yes, sir.

Mr. Thornton: Now, Judge, we would like to renew our objection at this time, and further make a motion to exclude, because it obviously appears that this is an effort to vary the terms of the written contract.

The Court: Same ruling, and same exception.

Mr. Green: I ask this question. I am not as familiar with Alabama practice as our friends here.

Mr. Lapsley: Same as Virginia.

Mr. Green: No. These papers appear to be copies. They are merely photostats, and not originals.

Mr. Lapsley: We make no objection as to whether they [fol. 98] are true copies.

The Court: Just consider them as being originals, if you want to.

Mr. Lapsley: Each one treated as originals.

Mr. Green: I want to make that statement, because if any point is taken on that, we submit a willingness now to submit duly authenticated copies.

The Court: No point on that.

Mr. Lapsley: No point on that. We concede they are copies.

Redirect examination.

By Mr. Mickey:

Q. I hand you a letter dated February 8th and marked Exhibit E, and ask you if you received that letter from the Constructing Quartermaster?

A. We did.

Mr. Mickey: We offer that Exhibit E in evidence.

Mr. Thornton: Is there something else here going in?

Mr. Mickey: Yes.

Mr. Lapsley: I didn't get through looking at all these exhibits.

Mr. Thornton: And we object to that.

The Court: Yes; and the same ruling.

Mr. Mickey: I will give you a copy.

Mr. Lapsley: Is that Exhibit E?

Mr. Mickey: That's right.

Mr. Lapsley: We object to this.

The Court: Yes. Same objection, same ruling.

Q. I hand you two papers, marked Exhibits F and G, which are letters dated November 12, 1940, and November 14, 1940, from the Constructing Quartermaster to Dunn Construction Company, Incorporated, and John S. Hodgson & Company, Fort McClellan, Alabama, and ask you if you have ever seen copies of these exhibits?

A. Yes, I have seen copies.

Q. Were the instructions given by the Constructing Quartermaster therein, followed?

A. Yes.

Mr. Mickey: I offer these Exhibits F and G in evidence.

Mr. Thornton: And note our objection, please.

The Court: Yes.

Q. I hand you a letter marked Exhibit H, dated February 17th, to the Constructing Quartermaster at Fort McClellan, Alabama, from the Project Manager of Dunn Construction [fol. 99] Company, Incorporated, and John S. Hodgson & Company, and ask you if you have seen a copy of that letter?

A. I may not have seen a copy of this particular letter.

Q. I ask you if that was a copy of a letter?

A. Wait. I may not have seen this particular letter.

Q. I ask you if that was a copy of a letter send by Dunn Construction Company, Incorporated, and John S. Hodgson & Company, to the Constructing Quartermaster?

A. I don't remember the instance. I didn't handle that personally, but I presume it is. The man had authority to write for us—Mr. Stout.

Q. I hand you a letter marked Exhibit I, and ask you if that is a reply to said letter?

A. Yes, sir.

Mr. Thornton: Are you offering all those?

Mr. Lapsley: We object. Well, he has not offered them yet.

Mr. Thornton: Are you offering those in evidence?

Mr. Mickey: I am offering these two documents, Exhibits H and I.

Mr. Thornton: And we object to them. Object to each of those, separately.

Mr. Lapsley: Object to them.

The Court: Yes.
Mr. Mickey: That's all.

Witness excused.
Testimony closed.

[fol. 100]

EXHIBIT "A"

Supplement to Guide for Constructing Quartermasters,
Revised 1940, Covering Fixed Fee Projects

Office Quartermaster General

August 27, 1940.

Note:—The Matter Contained In The Following Pages Is Intended As General Information Only To Aid The Constructing Quartermasters And Their Assistants In Connection With Fixed-Fee Contracts Covering Construction Work.

40/1354.

General

The following instructions pertain to supervision of work under Fixed Fee Contracts:

1. The information contained in the Guide for C.Q.M's as revised in 1940 is, in general, applicable to construction work being performed under either a lump sum or a Fixed Fee Contract, as are the Army regulations and other War Department documents mentioned therein. The laws, this Guide, Army Regulations, and other instructions have been and will be altered from time to time and it is the responsibility of the Constructing Quartermaster to keep himself and his office informed concerning the laws and regulations under which he must operate.

2. Appended hereto is a chart showing the recent reorganization of the Construction Division O.Q.M.G.

Constructing Quartermaster

3. All Constructing Quartermasters in the field have been supplied with certain Army regulations, Federal Specifications [fol. 101] tions, and other pertinent circulars and instructions or will be furnished same upon request. Any special

regulations, circulars, etc. desired in addition to these should be requested by letter to this office.

4. First. In Emergency construction for defense purposes, the most important element is time of completion. Speed is Essential.

5. Second. It is the duty of all Officers to see that all money is wisely and honestly expended.

6. Third. Each Constructing Quartermaster is responsible for the satisfactory completion of the job under his direction. He is expected to exercise initiative and to appreciate that he is directly responsible to the Chief of the Construction division for his operations. The Washington Office of the Construction Division will furnish Constructing Quartermasters information as to the requirements to be met, and the Constructing Quartermaster's primary duty is to fulfill these requirements and to keep the Washington Office informed by all the regular reports and by any special reports or letters considered necessary.

7. Fourth. The Engineering Branch, O.Q.M.G., will observe and review the technical features of the work of the Engineer-Architect so far as necessary and practicable without in any way delaying the progress of construction. To that end, the Constructing Quartermaster will as rapidly as possible, submit to this office, in duplicate, sketches, preliminary drawings and other data in sufficient detail to present clearly the dimensions, materials, capacities, structural features, architectural treatment and other elements proposed to be used. If the data submitted are unsatisfactory in any material degree, the Constructing Quartermaster will be notified by telephone or geograph, and will order such revisions which are at that time practicable.

8. Fifth. A Procurement and Expediting Branch has been established in the Construction Division of the Office of the Quartermaster General to centralize the purchasing and the mobilization of materials required in construction. If it appears that the normal methods of procuring and delivering material may break down to such an extent that a project will be delayed, this office should be advised immediately giving full particulars.

Special Instructions Regarding Correspondence

9. In the following instructions "this office" refers to the Construction Division which is a division of the Office of [fol. 102] the Quartermaster General.

10. The form of address for mail shall be: The Quartermaster General, Washington, D. C.

11. All correspondence to this office relative to construction on a Fixed Fee Basis will have the words (Fixed Fee Branch) immediately following the subject; example, Subject: Test Portland Cement, Springfield Arsenal (Fixed Fee Branch Telegrams or radios should be addressed: The Quartermaster General, Washington, D. C.

12. Each telegram to be consecutively numbered at the end thereof; Number First telegram "1" with prefix C. F. for Construction Branch Fixed Fee and then the number of the telegram or radio followed by E for the engineering branch of the Constructing Quartermaster Office. Example: "The Quartermaster General, Washington, D. C. C-Eight-N E Report forwarded today. C. F. One-E, Jones."

13. Every project in the field will be assigned to a Chief of Section in this office through whom all matters relating to the project will pass.

14. Depending upon the size of the project, a number of Commissioned Assistants will be ordered to report to the Constructing Quartermaster for duty. These Officers may be utilized in positions such as Executives, Property Officers, and as the Engineering representatives, etc. of the Constructing Quartermaster on the work.

15. Where necessary and considered advisable by the Constructing Quartermaster additional civilian engineering and other personnel may be employed—in accordance with regulations after obtaining the authority of this office for their employment.

16. The Constructing Quartermaster will utilize the Engineering Contractors and the Constructing Contractors engineering and other forces to the fullest extent.

17. A Field Auditor will be assigned to duty under the Constructing Quartermaster. He will be responsible for the employment of all necessary assistants, subject to the

Constructing Quartermaster's approval, and for the faithful [fol. 103] performance of all their duties. The duties and procedure of the Field Auditor and his assistants are defined in detail below.

18. The C. Q. M. may designate any of his Commissioned Assistants as property officers. The C. Q. M. will be jointly responsible *with his* Property Officers and they will inform themselves as to their responsibility and keep all necessary accounts as provided by Army Regulations, and property accounts will be kept as described therein, for which purpose he may utilize his Auditing Staff. All regulations as to bonds will be complied with.

19. When the construction is being performed by the Construction Division for some branch of the War Department other than the Quartermaster Corps, an Officer from another branch of the War Department may be assigned as the Constructing Quartermaster or as his assistant. It must be clearly understood that the authority of the Construction Division is paramount, in all matters whatever pertaining to the work and the C. Q. M. is the representative of the Quartermaster General at the site of the work.

Duties of the Constructing Quartermaster

20. The Constructing Quartermaster should read the contracts until he has become thoroughly familiar with it, and at frequent intervals read it again. He should also insist that the contractor do the same. Many unnecessary questions and much correspondence will thereby be avoided.

21. Before making or authorizing any expenditures upon the work, the Constructing Quartermaster shall first ascertain that he is authorized by this office to do so. It will be necessary at times, to begin work before plans are completed, and on verbal instructions as to the engineering features, but the Constructing Quartermaster will see that he is furnished at the earliest moment all necessary plans, specifications, and other data, and he or his representatives will advise the contractors fully as to the character of the work and the general order and manner of prosecuting it. Any verbal instructions necessary will be confirmed in writing for the protection of the Government and the Contractors.

22. The Construction Quartermaster will be responsible for the *conduct of the work* in accordance with the plans and specifications, these instructions and such special instructions as he may receive from this office from time to time. He will not depart from such instructions or data to any important extent without the written consent of this office, but he will be expected to make such minor changes as in his judgment are clearly necessary in the interest of expedition, quality or economy, and as to which time does [fol. 104] not permit this office to be consulted in advance. He will, however, advise this office of any such changes as promptly as possible.

The Contractor

23. The selection of the contractors for a fixed fee contract implies, in general, confidence in his capacity, specific experience and the possession of an adequate working organization, plant and plan of operation. In case the Constructing Quartermaster shall become convinced that the contractor is deficient in any of these respects, it shall be his duty to remedy the deficiency by suggesting necessary changes or additions be made in the contractor's organization or methods or if the deficiency be serious, to consult this office without delay as to what steps should be taken.

24. Assuming the possession of an adequate organization and plan of operation by the contractors, it is understood that they will *conduct* the work in accordance with their *usual methods*, except so far as may be necessary to comply with the requirements of this office, and subject, always, to the Constructing Quartermaster's approval.

25. The contractors shall provide such superintendents, engineers, accountants, clerical help, timekeepers, material checkers, etc., as are needed to properly conduct the work, subject to the approval of the Constructing Quartermaster. He will be responsible for the employment of all necessary men, teams, and plant, and for the efficiency of all of his representatives, assistants, and employees. It will be his duty to promptly check all plans and specifications which may be furnished him. Schedules of materials may be furnished the contractor for his assistance in preparing his own lists, but he must always understand that his responsibility for prompt, full and accurate bills of material is in

no way modified by any such information, which is given solely in order to get delivery of materials started at the earliest moment.

26. It is the policy to contract on a Fixed Fee basis, for the services of Architects and Engineers as well as for construction work and this guide will apply to both types of contracts.

Materials and Equipment

27. In purchasing material by the contractor the purchase order must always be first approved by the Constructing Quartermaster.

28. It is expected that the contractor will already have a large portion of the plant to handle the work. When a contract is awarded, the contractor shall submit to the Constructing Quartermaster, a list of the plant needed for the [fol. 105] work. The Constructing Quartermaster shall submit this list to this office and this office will furnish from available plant already owned by the Government, such items as are on hand, and shall authorize the contractor through the Constructing Quartermaster, to furnish the balance. Such plant and material, as may be necessary and available in the local markets for conducting the early operations prior to the arrival of material ordered on regular schedule, should be located by the contractor at once, and may with approval of the Constructing Quartermaster be ordered locally. A schedule of allowable rentals will be included in each construction contract.

Funds

29. The Constructing Quartermaster should note that immediately upon acceptance of materials, they become the property of the Government under the contract. He must be prepared to reimburse the contractor promptly upon his material vouchers, to take advantage of all cash discounts. A preliminary allotment of funds to start the work will be made by this office and thereafter it shall be the duty of the Constructing Quartermaster to make the necessary request for the necessary additional funds not exceeding the amount set aside for the project in this office.

Contracts and Sub-Contracts

30. The formal contracts for this work will be executed by the Officer in charge of Construction Division. The terms and conditions under which sub-contracts can be entered into are fixed by the general contract. Forms for such sub-contracts will be furnished by this office. Sub-contracts, except for plumbing, steam heating, electrical work, and other work that can be done more economically by specialized working forces, should not be entered into unless it is found that completion of the work can be materially hastened thereby. In every case of sub-contracts, the prior approval of this office will be required. After approval of a sub-contract by this office has been sent to the Constructing Quartermaster, he shall give his written approval to the contractor, before the sub-contract is executed.

Wages

31. Wages as determined by the Secretary of Labor under the Bacon-Davis Act will as set out in contract be paid on the project unless otherwise provided by the Contract.

Terms of the Contract

32. The employees of the contractor, such as assistant superintendents, foremen, etc., shall be subject to the approval of the Constructing Quartermaster on each project.

33. The contractor shall not attempt to secure labor at the expense of other government work. See letter CQMG—File QM 230.14 CNL, dated July 25, 1940.

Guard

34. A military unit may be sent to the site for guard duty by the using service. The guard will be disposed of by the Commanding Officer of Troops as requested by the Constructing Quartermaster in accordance with the necessities as indicated by him. In cases where circumstances prevent the assignment of a military unit for guard duty, the Constructing Quartermaster will arrange for civilian proper guards. Barracks or any other suitable buildings that have been constructed may be used for housing the guard.

Hospital and Medical Services

35. The contractor must provide hospital and medical services for his forces, and must comply with sanitary regulations prescribed by the Constructing Quartermaster.

Temporary Buildings

36. Temporary buildings as needed may be constructed in accordance with appropriate mobilization or other plans by the contractor for warehousing of materials and for the housing of the Constructing Quartermasters, the Contractors, and the Finance Officer's office forces and for other purposes. Such buildings will be constructed and located in a manner making it possible for the Government to use them after they have served their purpose with the contractor.

37. Temporary housing for workmen, unless covered by the contract, will require prior approval of this office. Portions of the permanent buildings when available may be used for temporary offices by the Constructing Quartermaster. When permanent buildings are vacated, they shall be thoroughly cleansed and fumigated under the direction of a medical officer. Telephone service for Constructing Quartermasters will be secured in accordance with the provisions of Par. 13—AR 5-200.

Progress Reports

38. Progress reports, together with ideal charts and photographs, will be furnished as called for in the guide for C. Q. M.'s and by the Chiefs of Sections.

[fol. 107] Completion Reports

39. Completion reports as required by AR 30-1435 will be furnished at the completion of project by Constructing Quartermaster. The preparation of data for this report should be started with the beginning of the project.

40. Accurate and detailed records of all underground utilities will be maintained as the work progresses and will be kept up to date. Copies will be furnished the Post Quartermaster as well as this office as work is completed.

41. Whenever necessary to expedite the accomplishment of the defense program, purchasing officers may resort to

the execution of negotiated lump sum contracts or negotiated cost-plus-fixed-fee contracts only upon the specific authority of this office, and in accordance with the specific instructions of this office concerning the method of negotiation to be followed.

Auditing

42. The Field Auditor is in charge of the auditing in connection with all Government construction which is under the supervision of the Constructing Quartermaster and he reports and is responsible directly to the Constructing Quartermaster. It is his duty to aid and assist the Constructing Quartermaster in seeing that the provisions of the contract are carried out and carefully to substantiate all transactions connected with the expenditure of the Government moneys in auditing procedure.

43. Matters not specifically covered herein may be found in Q. M. C. Publications, W. D. Circulars, W. D. Procurement Circulars, Finance Circulars and Army Regulations. However, in case of doubt this office should be consulted in order to determine the proper procedure.

44. The Field Auditor should bear in mind that the contractor must be reimbursed promptly for expenditures made by him and that every department of the organization must be running smoothly in order that this may be accomplished. His duty in this respect is active and not passive, and if the contractor's organization does not forward documents to him with sufficient promptness, he should take steps to bring this about.

45. He must remember at all times that the Government's accounting regulations and requirements as to auditing, are far more rigid than those of commercial organizations. [fol.108] He must impress upon every member of his staff that their discretionary powers are limited by the stipulations of the contract and the regulations of the Field Auditor's Manual.

46. It is of utmost importance that all records be kept at all times abreast with the work. The Field Auditor is not merely keeping a set of records, but his work consists of maintaining a continuous pre-audit kept up from minute to minute. Each day all matters pertaining to the preceding day must be duly approved and properly recorded. No arrears shall be allowed to accumulate.

47. He shall see that his department is economically administered having regard for the urgency of the work and that due care is exercised in the handling of Government property entrusted to him.

48. All accountability papers must be signed by the Constructing Quartermaster or the property officer if other than the Constructing Quartermaster is so designated or a commissioned assistant designated by him.

49. The Field Auditor must instruct all members of his staff that their work is entirely confidential and no information is to be disclosed by any one to anybody except through official channels.

Field Auditor's Staff

50. The basis for the organization of the Field Auditor's office shall be seven (7) general departments as follows:

Department	Head	Principal Duties
1. Fiscal	Chief Fiscal Auditor	Money Accountability
2. Materials	Chief Material Inspector	Receiving, Inspection and Delivery of Materials.
3. Labor	Chief Time Inspector	Supervising Time and Payrolls
4. Transportation	Chief Transportation Inspector	Handling Traffic and Claims
5. Tools and Equipment	Chief Equipment and Tool Inspector	Contract Property and Rentals.
6. Commissary	Chief Commissary Auditor	Supervising Commissary
7. Administrative	Administrative Assistant	Mail, Filing, Personnel General

51. Attached to this manual is an organization chart showing the departmental relations in the Constructing Quartermaster's Office in a general way. Two or more departments shall be combined under one head whenever conditions warrant it.

[fol. 109] 52. The Field Auditor shall furnish the Engineering Department of the Constructing Quartermaster with such cost data from financial records as shall be required. The cost analysis shall not, however, be in his charge but shall be prepared by the Cost Accounting Section of the Engineering Department.

53. Each and every employee of the Field Auditor's staff is obliged to carry out the instructions of the Field Auditor to the fullest extent in whatever department his services may be required.

54. The heads of the Departments shall be furnished, by the Field Auditor, with copies of this guide, general instructions to Constructing Quartermasters and, where necessary, all contracts and sub-contracts.

Fiscal Department

55. The Fiscal Department shall be in charge of the Chief Fiscal Auditor, who shall act in general supervision, under the Field Auditor, of all of the departments. In the absence of the Field Auditor, the Chief Fiscal Auditor will act for him in directing the operations of his staff. His principal duties include the following:

1. Final audit of all invoices, payrolls, etc.
2. Maintaining controlling account for Invoice Register.
3. Recording vouchers.
4. Maintaining record showing status of funds.
5. Maintaining liability record.
6. Preparation of financial reports.

56. The Chief Fiscal Auditor receives checked invoices from the Materials, Commissary and Tool Departments with the supporting papers and checked payrolls from the Labor Department with receipts attached.

57. He makes a detailed audit of all papers and checks the distribution. A file showing the approved signatures of all persons authorized to pass on vouchers, shall be kept for reference.

58. After having audited the papers, the Chief Fiscal Auditor will place his signature on the original and duplicate copies of the invoices and payrolls.

Materials Department

59. The Materials Department is administered under the supervision of the Chief Materials Inspector.

60. The principal duties of this department may be [fol. 110] grouped under five sub-divisions, as follows:

Branch	Head	Principal Duties
(a) Purchase Order	Order Clerk	Checking prices and recording of orders.
(b) Receiving and stores	Chief Receiving Clerk	Checking quantities received and supervising stores.
(c) Inspection	Chief Inspector	Inspecting quality
(d) Invoice	Invoice Clerk	Recording and checking invoices and maintaining statistical record of expendable materials.
(e) Property	Property Record Clerk	Maintaining property records.

Labor Department

61. It is the policy of the Construction Division that the contractor shall keep all time and prepare all payrolls, the Field Auditor maintaining an independent check of the time and auditing the payrolls. The time keeping system must be adapted to the particular requirements of the project.

62. The Labor Department shall have entire supervision of all labor accounting including the checking of time and payment of wages.

63. This department shall be in charge of the Chief Time Inspector whose principal duties are as follows:

- a. To maintain a record of employees.
- b. To make an independent check of the time of employees.
- c. To audit payrolls.
- d. To verify wages paid employees and to witness payment thereof.
- e. To check receipts for wages with payrolls in order to determine the amount to which the contractor is entitled for reimbursement.
- f. To maintain continuous record of unclaimed wages.
- g. To supervise team accounting in the same manner as labor accounting.

Traffic Department

64. The Traffic Department is administered under the supervision of the Chief Transportation Inspector. The duties of the Traffic Department include the following:

- a. Maintaining Traffic Records of all shipments received.
 - b. Preparing bills of lading for accomplishment by proper officer and maintaining record thereof.
 - c. Keeping in touch with downtown freight yards and depots, appointing special representative if necessary and notifying Materials Department in advance of arrival of freight.
 - d. Maintaining record of all demurrage and the reason for the accruing of the charge.
- [fol. 111] e. Preparing claims against carriers.

Equipment and Tools Department

65. The Equipment and Tools Department, dealing with the purchase and rental of all tools and equipment, shall be in charge of the Chief Equipment and Tools Inspector.

66. The duties of the Chief Equipment and Tools Inspector with respect to purchase of tools and equipment shall include the following:

a. To inspect all tools and equipment when brought on the work, and to see that they are in sound and workable condition.

b. To secure memorandum receipts for all non-expendable material for which the contractor is reimbursed.

c. To keep a close watch on the contractor's tool house and supervise methods of handling tools in order that wastage and loss may be reduced to a minimum.

67. The memorandum receipts for tools and equipment used by the contractor, whether signed by him or not, shall be held as a charge against the contractor until the completion of the work pending final settlement.

68. The contractor must properly safeguard the handling of tools. Where possible all tools should be passed through a general tool house and receipts taken from the men or sub-foremen as they are issued. It will be necessary for the contractor to maintain a file showing signatures of his foremen and sub-foremen for reference.

Commissary Department

69. The Commissary Department is administered under the supervision of the Chief Commissary Auditor.

70. The standard form of contract provides that the cost of all commissary operating personnel and supplies will be borne by the Contractor and that all commissaries shall be operated as nearly as possible without profit or loss and shall be subject to such sanitary regulations as the Constructing Quartermaster may prescribe.

71. It will be the duty of the Chief Commissary Auditor to audit commissary expenses and receipts for the purpose

of determining that the provisions of the contract are properly carried out by the Contractor.

Administrative Department

72. The Administrative Department shall be in charge [fol. 112] of the Administrative Assistant.

73. His particular duties shall include direct charge of the following:

- a. Personnel.
- b. Mail, telegrams, etc.
- c. Files.
- d. Supplies.
- e. General.

74. The Administrative Assistant shall see that all documents and reports from the various departments, and also from the contractor, are properly and promptly forwarded to the Field Auditor.

75. He shall keep a daily record of time of all employees on the Field Auditor's staff and shall have charge of the payroll. He must familiarize himself with the Government regulations in respect to civilian employees and see that all records are kept and payments made in accordance with existing instructions and regulations. *

76. If so directed by the C. Q. M. the Administrative Department of the Field Auditors office may act as the Administrative Dept. for the entire office of C. Q. M.

77. Copy of Instructions to Contractors relating to accounting and auditing procedure under Cost-Plus-A-Fixed Fee Contracts immediately follows:

"Instructions to Contractors Relating to Accounting and Auditing Procedures Under Cost-Plus-A-Fixed-Fee Contracts."

General

1. The Constructing Quartermaster (C. Q. M.) in charge of the project controls the accounting methods and pro-

cedures under fixed-fee contracts through an auditing staff, headed by a Field Auditor, organized, generally, as follows:

Field Auditor

Department	In Charge Of
Fiscal	Chief Fiscal Auditor
Materials	Chief Materials Inspector
Labor	Chief Time Inspector
Transportation	Chief Transportation Inspector
Tools and Equipment	Chief Tools and Equipment Inspector
Commissary Administration	Chief Commissary Auditor Principal Clerk

[fol. 113] 2. The contractor will carefully observe the provisions of the contract respecting accountability and the related laws and Governmental regulations. Full cooperation will insure prompt reimbursement for expenditures. The Field Auditor makes a detailed pre-audit of all costs and expenses incurred prior to payment thereof by the contractor insofar as this is practicable. Upon receipt of the contractor's vouchers for reimbursement, verification will be readily possible by the Field Auditor. Thereupon the verified voucher will promptly be submitted to the C. Q. M. for his approval and certification to the Finance Officer for payment.

3. Essential general requirements that must be observed by the contractor are: (a) Make no commitment without subjection to the approval of the C. Q. M. (in advance if so required); (b) Support all vouchers for reimbursement with original invoices or original payrolls accompanied by original receipts from vendors or employees.

4. The Contractor's office procedure and accounting system will presumably be found adaptable to Government requirements. The Field Auditor will see to it that the practices are in line therewith.

Detailed Instructions

1. Purchases of Materials, Equipment, Etc.

- a. 3 bids required (where sources are available).

b. Purchase orders are subject to approval of the C. Q. M. See attached specimen form for instructions, copies required, etc.

c. Receipts of materials, etc. are to be checked and inspected by the C. Q. M. upon delivery.

d. Vendors' invoices—original (receipted) and three copies are required by C. Q. M.

e. Vendors' receipts are required on original invoices. In case of more than one invoice from a vendor, summary statement may be receipted.

2. Employees.—Wage Rates, Time and Payroll.

a. Wage rates are fixed by schedule determined by Labor Department.

b. Salaried employees' compensation shall be on basis of preceding year unless increase is approved by the C. Q. M.

c. All employees are to be hired subject to approval of the [fol. 114] C. Q. M. Personal history of each employee is to be on record.

d. Employees are to be checked in and out each day by the C. Q. M. and each morning and afternoon on the job.

e. Payroll deductions are limited to Social Security taxes and State taxes.

f. Payroll. Original (supporting reimbursement voucher) and three copies are required by C. Q. M.

g. Payment of wages must be witnessed by representative of C. Q. M.

h. Receipt for wages is required from each employee.

3. Rental of Equipment

a. Rental rates will be predetermined by the C. Q. M.

b. Rental contracts shall be subject to approval by the C. Q. M.

c. Valuation of rented equipment shall be subject to approval of the C. Q. M.

d. Title to rental equipment shall vest in the Government when total rental paid equals valuation (an additional 1% per month to be paid by the Government).

e. Rental equipment shall be in sound and workable condition.

f. Time of rental shall be verified currently by the C. Q. M.

g. Payment of rental shall be made monthly.

h. Receipts for rental shall be obtained from owner of equipment.

4. Transportation Charges On Materials And Equipment.

a. All transportation charges shall be verified and approved by the C. Q. M.

b. Original receipted freight or trucking bills shall accompany reimbursement voucher.

5. Traveling Expenses

a. All traveling expenses are subject to the approval of the C. Q. M.

b. Advance written approval of the C. Q. M. is required in particular respect to (1) transportation and traveling expenses to and from the work of the field forces, and (2) traveling and hotel expenses of officers, engineers and other employees of the contractor.

c. Travel expenses and subsistence shall conform to the allowances authorized by the "Standardized Government Travel Regulations", unless otherwise authorized by the C. Q. M.

d. Receipts from recipients of travel expense shall be required in each case.

[fol. 115] 6. Cash Discounts, etc.—The Contractor shall take advantage of all discounts and allowances.

7. Fixed Fee—Ninety per cent (90%) of the fixed fee shall be paid as it accrues in monthly installments based upon the percentage of completion of the work. The unpaid balance shall be paid upon final acceptance of the work.

8. Records—All records shall be preserved by the contractor for three years after completion of the work.

9. Bonds—The contractor shall furnish such bonds as may be required.

10. Contractor's Organization—The contractor shall furnish the organization charts and statements of procedure called for by the C.Q.M.

Office of the Quartermaster General
Chart of the Office of the Construction Division

	Chief of Construction Division	
Liaison Branch	Executive Office	Funds & Estimates Branch
Administration Branch	Construction Branch (Lump-Sum Contracts)	Accounting & Auditing Branch
Engineering Branch	(W.P.A. & P. and H. Work)	Repairs & Utilities Branch
Construction Branch (Fixed-Fee Contracts)	Legal Branch	Real Estate Branch
	Procurement & Expediting Branch	

[fol. 116]

Organization Chart
Office of the Constructing Quartermaster
For Work Under Fixed Fee Contracts Only

S C Q M

C Q M

Comm. Off.

Field Aud. See Cht. "A" (Civilian)	Property Off. Comm. Off.	Executive Officer Comm. Off.	Ton. Officer (See Cht A) Comm. Off.	Safety Engr. Fire Marshal & Sanit. Off. Comm. Off.	Chief Clerk (Civilian)
Supervision of Engineering by Government Check on Arch. and Engr. Plans and Serve in an Advisory Capacity as Directed by the C. Q. M. Necessary Com- missioned Off's. & Civilian Engrs as needed.	Architectural of Engineering Contractor For The Architectural and Engineering Design of Project including Supervision & Inspection During Constn. Force as decided With The CQM	Construction Contractor For The Construction of the Project Furnishes all Labor, Material and Equipment as provided in Contract Force as decided With the CQM	Supervision of Construction by Government Check on Const. Operations	Necessary Comm. Officers and Civilian Assistants	Personnel Mail and Records Reports Statistics Files Stenogs. & Messengers

Note: This chart is functional only and may be changed to suit local conditions. It must be understood that on a Fixed Fee Project the Fixed Fee Architectural or Engineering Contractors will do all the Architectural, Engineering and Inspection work and this Word should not be duplicated by the CQM. Maximum use will be made of Officers in a Supervisory Capacity. The American Railroad Association, Public Roads Administration under Federal Works Agency, and the National Board of Fire Underwriters may be requested to furnish representatives if needed.

[fol. 117]

**Chart of Field Auditor's Organization
Constructing Quartermaster
Field Auditor**

		Fiscal					
		Chf Fis Aud					
Materials	Labor	Traffic		Tools & Eqpt	Commissary		
Chf. Mat'l.	Chief Time	Chief	Funds	Chief Eqpt	Chf	Administr've	
Inspector	Inspector	Transp		& Tools Insp	Com'm'y	Administr've	
		Inspector			Auditor	Assistant	
Orders	Employee's	Traffic	Liability	Contract		Personnel	
Order Clk	Records		Records	Property			
	Record Clk						
Invoices	Time	Claims	Status	Rentals		Mail	
Invoice Clk	Time Chkrs		of Funds				
Recording	Pay Roll		Vouching			Filing	
	Pay Roll Clk						
Receiving	Payment of		Auditing			Supplies	
Rec'vg Clk	Wages						
	Payment Clk						
Receiving			Record'g			General	
Storing			Costs				
Issuing			Reports				
Inspecting			Statistics				
Inspector							
Property		Equipment	Labor	Revenue	Operating		
Records		& Supplies			Results		
			Mess Houses and	Stores			
Prices	Invoices	Warehousing	Time	Payroll	Cash	Payroll	Profit
						Deduct-	or Loss
						ions	
						Receipts	
						& Expend-	
						itures	

[fol. 118]

EXHIBIT "B"

War Department, Office of the Quartermaster General,
Washington

In Reply Refer to QM 300.5 (Fixed Fee Letter No. 5).

Subject: Relations between Constructing Quartermaster
and Contractor on Cost-Plus-A-Fixed-Fee Contracts.

To: The Constructing Quartermaster.

1. Considerable difficulty has arisen in the field due to the lack of understanding on the part of the Constructing Quartermaster in regard to his relations with the contractor who has been selected by this office to perform the work. Constructing Quartermasters should bear in mind at all times that construction being carried out under cost-

plus-a-fixed-fee contract is in the nature of a co-adventure between the contractor and the Government. The Constructing Quartermaster's principal function comprises general supervision of the contractor's operations and to see that Government interests are protected, and not to furnish technical supervision and directions for the contractor's work. Both the engineering and construction contractors have been paid a fair fee for doing their respective parts of the work and they should be given a free hand in doing these operations, insofar as they are consistent with good practice, and an accurate accounting is kept of all expenditures.

2. Your particular attention is invited to letter of this office, W.O.5 Fixed Fee Letter No. 1—Subject: Directive and Instructions on Cost-Plus-A-Fixed-Fee Contracts, C.B.F.F. General Field Letter No. 1, paragraph 3, it is felt that this gives you a clear definition of what is expected of you. In cases of borderline decisions between what you think is correct and the contractor's judgment based on his past experience of what he feels is the proper procedure, there should be a tendency to go the contractor's way so long as fundamental laws are not violated and the Government's interests are protected. In certain remote localities the actual securing of a number of bids on small purchases of one thousand dollars or less is frequently a hardship and costs more in telephone tolls and administrative expense than the savings involved and more seriously the securing of such a number of bids requires waste of valuable time. For such small purchases the contractor should be permitted to make the purchase in his customary manner at what you and his purchasing agent consider to be a fair market price. On many occasions it will only be possible to get one quotation and if such quotation is satisfactory on its face and [fol. 119] appeared to be a just price, you should not hesitate in permitting the contractor to make these purchases in order that the progress of the work will not be delayed.

3. The only restriction that has been placed upon the salary of contractors' employees is that no employee receiving in excess of \$9,000 per year will have his salary reimbursed by the Government. Salaries below that figure are subject to your approval and need not be submitted to this office for final approval. In this we rely on you to use your best judgment in determining whether or not the man employed has a record in the past that will justify the

salary to be given. It should be borne in mind that to complete these projects in the time required, a high calibre type of personnel must be employed by the contractor and in order to secure that type of personnel the contractor must of necessity pay a substantial salary at all times somewhat in excess of what the person has been accustomed to receiving, due to the employee having to leave his home and set up a new residence or maintain a double establishment for a very short period of time, and furthermore, it should be recognized that certain men during the past few years have worked at salaries below their normal capacity due to the scarcity of jobs which they are qualified to fill.

4. It has been noted that in some cases the Constructing Quartermasters have been requiring their contractors to take out certain forms of fire insurance. Subject to your approval this insurance is a matter for the contractor to decide on, so long as the property is in his possession and has not yet become the property of the Government but as soon as such property arrives at the site and is checked in by your inspecting staff and actually becomes the property of the Government, there is no need for fire insurance inasmuch as the Government has always been a self-insurer and, due to the volume of material handled by the Government, it has not been found economical to insure its own property. Extreme care, however, must be taken to guard against loss by fire and mechanical fire extinguishers, fire barrels, etc., must be liberally distributed over the job and alert watchmen maintained at all times to guard against fire. This office will recognize requisitions for fire fighting equipment to be sent to projects whenever the Constructing Quartermaster feels that it is required in connection with his work.

5. It being wholly impossible to foresee and enumerate in the contracts all of the items of materials, services, and labor (which terms are all inclusive) to be furnished or provided by the contractors, the contracts enumerate only [fol. 120] the major items specifically required by the contracts and certain other items which could be foreseen as likely to enter into the operations under the contracts. The contracts, therefore, provide that the term "actual net cost" shall include specifically but not exclusively the items enumerated. Inevitably many unforeseen items of cost arise during the progress of the work of the character and magnitude of that covered by these contracts.

6. The present authorization for the use of cost-plus-a-fixed-fee contracts was justified by the very unusual construction program involved in the development of outlying posts where there are no ready contacts with labor and material markets, where the working conditions are hazardous, and the time element was of serious moment. The speedy and certain accomplishments of the projects covered by the contracts was and is considered by those bearing the burden of responsibility for the national defense as of the utmost importance. The contractors selected to cooperate with the Government and contribute their resources, experience, and skill toward the accomplishment of the project, include in their organizations men of unquestionable integrity and patriotism. Their success in the commercial world establishes their abilities. Their judgment along the lines of their qualifications is entitled to the highest of faith and credit. The monetary compensation they will receive is comparatively modest as indicated by the fees allowed. The general intent of the special legislation, the negotiations thereunder, and the contracts is clearly that the contractors shall be made whole for their out-of-pocket expenditures for the benefit of the work under the contracts, as may be approved or ratified by the contracting officer, acting under the direction of the Secretary of War. Any action which conforms to such general intent is entitled to approval.

For The Quartermaster General:

E. E. Kirkpatrick, Captain, Q. M. C. Assistant.

40/1600.

[fol. 121]

EXHIBIT C

War Department

Office of the Quartermaster General, Washington.

[Stamp] Received Feb. 24, 1941, C. Q. M. Fort McClellan, Alabama.

In Reply Refer to QM 300.5 C-C.

February 19, 1941.

Construction Division Letter No. 101

Subject: Responsibility of local Constructing Quartermasters and relationship with Architect-Engineers and Construction Contractors on Projects.

To: All Zone Constructing Quartermasters, All Local Constructing Quartermasters, All Architect-Engineers (through local C. Q. M.), All Construction Contractors (through C. Q. M.)

1. The local Constructing Quartermaster is the official in responsible charge of the project to which he is assigned. He is the authorized representative of the Government on the project. He will discharge his duties under the direction and supervision of the Quartermaster General through the orders and instructions of the Chief of the Construction Division and the Zone Constructing Quartermaster of the Zone in which his project is located. In the absence of the local Constructing Quartermaster the next senior assistant Constructing Quartermaster will function in his stead unless otherwise arranged by the Zone Constructing Quartermaster.

2. The Architect-Engineers and the Construction Contractors on the project together with the military and civilian assistants assigned for duty with the local Constructing Quartermaster will report to and are responsible to the local Constructing Quartermaster as the authorized representative of the Government in charge of the project.

However, nothing is contemplated in the operations of the project which relieves the Architect-Engineer and the Contractor of their responsibility to the Government for sound and economical fulfillment of their contractual and professional obligations.

3. The Local Constructing Quartermaster will:

a. Insure compliance with terms of contracts.

b. Assure correctness of expenditures.

[fol. 122] c. Serve as a liaison officer for the Architect-Engineer and for the Construction Contractor in all phases of government operations.

d. Obtain full information as to Government Requirements so as to facilitate the work of the Architect-Engineer and the Construction Contractor.

e. Negotiate contractual arrangements involving sewage disposal with municipalities, right-of-way with adjoining property owners, railroad spurs and the like, subject to the advice and such approval as is necessary by the office of

the Quartermaster General. In this the local Constructing Quartermaster may use the services of the Architect-Engineer or the Contractor.

f. Approve or secure approval of sub-contracts submitted by the Construction Contractor or the Architect-Engineer.

g. Promptly transmit instructions and information to the Architect-Engineer and the Construction Contractor received from the office of the Quartermaster General in Washington.

h. Act or secure action promptly on all requests or recommendations of the Architect-Engineer or of the Construction Contractor.

i. Exercise overall supervision of the project to insure that all phases of it are being soundly coordinated.

4. The Architect-Engineer, under the direction of the Local Constructing Quartermaster, will:

a. Insure that the project requirements are met in accordance with sound design and construction practice, including the overall project layout, as well as the design and arrangement of specific structures and utilities. Standard Army structures will be employed unless the Architect-Engineer's review of the plans indicates a practice that he deems unsuitable, in which case he will make suitable recommendations, with reasons therefor, to the local Constructing Quartermaster.

b. Insure that construction conforms with design, and make or require to be made such tests and inspections as may be necessary to determine quality and conformity with plans and specifications.

c. Prepare a sound estimate of overall cost and the costs [fol. 123] of the major parts of the project, including such breakdown as may be required by the local Constructing Quartermaster.

d. Prepare, in conjunction with the Construction Contractor, job progress schedules.

e. Report on and make recommendations as to the relationship of actual progress and scheduled progress, the actual costs and estimated costs.

f. Perform such other duties as directed by the local Constructing Quartermaster.

5. The Construction Contractor, under the direction of the local Constructing Quartermaster, will:

a. Conduct, in an efficient manner, all phases of the construction work. Important in this is a prompt and comprehensive organization set-up to insure effective job planning, forward-looking handling in the employment of labor, including wages, conditions of work, safety, food, housing and transportation; procurement of materials and methods to facilitate storage, distribution and fabrication in the field at the location desired; procurement of good construction equipment. In the procurement of materials there is involved the responsibility to take such steps as are necessary to insure delivery of materials where the initial procurement steps have been taken by Government agencies; lumber, heaters, and boilers for hospital units are examples.

b. Advise the Architect-Engineer in the preparation of a sound estimate of overall cost, and a breakdown of the cost of the larger parts of the project; concur in such estimates or make notation of exceptions; advise Architect-Engineer when any revision of estimates becomes necessary; install adequate cost control procedures.

c. Prepare, in conjunction with the Architect-Engineer, job progress schedules; advise Architect-Engineer when any changes become necessary; install adequate progress control procedures.

d. Maintain such cost data as is required by the Government.

6. On projects, such as Ordnance Manufacturing Plants, a Design-Consultant may be employed to insure that the plant is of sound design and such as to best meet the operating conditions imposed by the Using Service for which the plant is being constructed. Close cooperation between the Using Service, the Design-Consultant, the Architect-Engineer, the Construction Contractor, and the [fol. 124] local Constructing Quartermaster is therefore of paramount importance in order to insure the construction of a plant with satisfactory operating characteristics.

The Using Service is the service for which the plant is

MICRO CARD

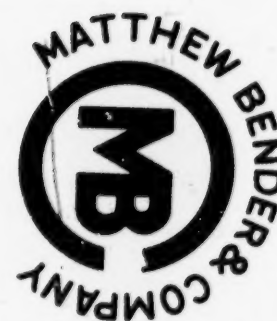
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being constructed and is the service which will be responsible for the operation of the plant. Its position is analogous to that of a client in private construction practice. The local Commanding Officer of such plant is the representative of the Using Service on the ground and is responsible that the needs of that Service are fully considered at all times.

The needs of the Using Service will be communicated to and carried out on the project through the local Constructing Quartermaster, unless they contravene standing orders, existing policy, are extravagant or contrary to sound engineering practice. In such cases the matter will be referred at once to the Zone Constructing Quartermaster.

7. On projects at troop stations, as distinct from manufacturing plants, the Local Constructing Quartermaster is not authorized to undertake any program changes desired by local authorities unless and until such changes are concurred in by the Zone Constructing Quartermaster and approved by this office.

8. All previous instructions at variance with the provisions of this letter are hereby rescinded.

For the Quartermaster General:

Brehon Somervell, Brigadier General, U. S. A.,
Assistant.

Distribution List:

12 Copies to Each Zone Constructing Quartermaster,
5 Copies to Each Constructing Quartermaster, Copies to
All Branches, Control Section and Public Relations Section,
Construction Division, War Department and Bureaus
Concerned.

EXHIBIT "D"

[fol. 125] Conference Held With Dunn Construction Company and John S. Hodgson and Company

Conference Held in Room 2241, Munitions Building, Washington, D. C., September 6, 1940, with Mr. W. R. J. Dunn of the Dunn Construction Company, Inc., and Mr. John S. Hodgson of the John S. Hodgson & Company of Birmingham, Alabama, Representing the Contractor: and Lt.

Colonel E. G. Thomas, Mr. H. W. Loving and Mr. F. J. O'Brien, Representing the Government Relative to Construction of Camp McClellan, Alabama, with Mr. Loving Presiding.

MR. LOVING:

Mr. Dunn, as I advised you this afternoon, you and Mr. Hodgson have been recommended by the Construction Advisory Branch for consideration in connection with the construction of the permanent tent camp to be built at Camp McClellan, Alabama. I showed you a description and estimate of cost of the work to be done which consists of utilities estimated to cost approximately \$796,700 and temporary buildings of various kinds estimated to cost \$2,674,250, which with certain tents for troops which are displaced by the hospital, will make a total project cost including overhead, engineering and contingencies of approximately \$3,702,935. Based on the best information available at this time we estimate that the net construction cost plus the contemplated fee to be paid the contractor totals \$3,335,977. As I advised you further, time is vitally important in this particular instance as it is desired if humanly and physically possible, to complete this project by October 15th. Practically all of the plans are complete. However, it will be necessary for the Government to retain private engineers to make certain surveys locally, to develop a topographic map to design the utilities, to place these standard buildings to be constructed on the definite site. It is contemplated that this engineer be employed immediately and that the necessary engineering work to be done without delay. Further, that construction parallel the engineering work and completion of plans as closely as possible. From your questionnaire I note that the combined annual value of work done by the Dunn Construction Company and John S. Hodgson & Company, has averaged about \$3,000,000 in recent years. I would like to ask what volume of work both of you have under construction at this time, or under contract?

Mr. Dunn: The two companies have today between \$100,000 and \$125,000 of uncompleted work on hand.

[fol. 126] Mr. Loving: You, therefore, then based on your statement of average volume, are in a position insofar as finances, personnel and equipment are concerned to under-

take approximately \$3,000,000 work at this time. Is that correct?

Mr. Dunn: At least that much or more.

Mr. Loving: Do you contemplate, if awarded contract for construction of the work at Camp McClellan, to continue active in the competitive market?

Mr. Dunn: Except for exceptional isolated cases, in dealing with old customers, where the volume is small, we do not expect to continue in the competitive field.

Mr. Loving: Considering the time element, it is anticipated that it will be necessary for the members of both organizations to devote practically their entire time toward planning, organizing, purchasing and directing the construction of this project in order to complete the project within the desired time. If awarded the contract may we count on the cooperation and direction of you two gentlemen as principals, and your other key men except in the instances to which you refer?

Mr. Dunn: Yes, sir.

Mr. Loving: For your information, Mr. Dunn, there is a feeling in certain quarters that there are few men in the South, possessing the necessary experience, organization, energy, vision and initiative required to handle a project of this character. Personally I do not share this belief and do not consider the fact that a successful contractor has not actually executed contracts of like volume as definitely proving that he can not if he devotes his time, attention and organizing ability to it, organize to handle a job of this magnitude. If you are retained to handle this job I feel to a large extent that the honor and pride of the State of Alabama will be largely at stake. The Government has selected Fort McClellan as a site for an important camp and I feel that you as principals of these two contracting firms and others who have pride in accomplishment of the citizens of Alabama, could do nothing better than to put their shoulders to the wheel, cooperate to the fullest extent, to show the War Department and critics from other sections that you, as contractors, the suppliers of labor, materials and equipment in Alabama, can accomplish results as efficiently and as economically as anyone else from any other part of the country. Mr. Dunn, as a result of work that you did under the direction of my old engineering firm and my personal knowledge of your business capacity and general standing in your community. I am assuming the responsi-

[fol. 127] bility of offering to you and Mr. Hodgson the job of undertaking the construction of this project at Camp McClellan, believing that you will take a personal pride in this project, and having faith that I will never have cause to regret having recommended you, a Southern contractor, to undertake this project. In order to expedite the delivery of lumber, heaters, pipe and other standard articles of materials required for the project we are now having made a complete material take-off and as soon as this information is available, it is contemplated that the Government, through Procurement Branch, will enter the market and attempt to locate and secure firm quotations for these materials. It is contemplated that if satisfactory prices can be secured, definite orders for all of the lumber will be placed and instructions for shipment and delivery will be made without delay. As I informed you, it is estimated that approximately \$3,778,000 will be required for the construction of the project and the payment of engineering, overhead and supervision expenses. At present there is actually available \$400,000 leaving a deficit as of today of approximately \$3,378,885 which deficit it is anticipated the Congress will cover by making additional appropriations available for this work. It is contemplated that a contract be prepared and executed to cover the entire work planned but it will be necessary to include in the agreement, a provision to the effect that if additional funds are not made available by the Congress that expenditures incurred by you shall not exceed \$400,000. This means that it will be necessary for us to review and check the plans for the project and to select certain utilities and certain structures to be constructed which can be built within the funds now available. It is my understanding that you consider you are equipped and prepared to handle the construction of all items of work with your own forces except inside electrical work, plumbing and heating, and possibly the outside electric distribution system. Is that correct?

Mr. Dunn: Yes Sir. From what we have seen, from what we know about the project now, we think that is the case.

Mr. Loving: I may state that the project embraces certain relatively simple building projects and certain simple utilities, such as water and sewer plants, roads, railroads, telephone and electric distribution systems.

Mr. Dunn: The only parts of the work that we contemplate subletting are such parts as time and money would be saved by subcontracts.

[fol. 128] Mr. Loving: We recognize, Mr. Dunn, that but few, if any, general contractors are fully equipped and manned to undertake every phase of building construction. We recognize that it is customary for the average general contractor to sub-let inside electrical plumbing and heating and similar mechanical work. According to the best estimate we are able to prepare at this time to estimate the net construction cost exclusive of overhead, engineering and fixed fee to be paid the general contractor at \$3,304,588 and based on a schedule of fixed fees, which is being paid on all of these projects of like character, we estimate it is worth a fixed fee to the Government, to have this work performed for \$128,865. I would like to ask if such a fee would be entirely satisfactory and acceptable to you gentlemen?

Mr. Dunn: We are delighted to do this work at the fee which you have set up as compensation for same.

Mr. Loving: While we do not anticipate that this Camp will not be built in its entirety, yet I want it clearly understood that there is only \$400,000 available at this time and if for unexpected reasons only \$400,000 is spent, the fee to be paid you will be paid pro-rata on the same basis as the fee applying to the entire project. The fixed fee mentioned approximates 4.02 per cent of the estimated construction costs and in case only \$400,000 is spent, then in settling with you we would expect to pay you an equivalent fixed fee on the amount actually spent. You, of course understand Mr. Dunn, from the questionnaire, that it is not contemplated that any of your executive officers or any member of the firm, if either of you are *are* a partnership, will be paid on a reimbursable basis.

Mr. Dunn: Yes Sir, we understood that.

Mr. Loving: You likewise understand that we have adopted a policy of paying no man on any project in excess of \$9,000 or more than he earned last year. However, in determining his present salary recognition will be given to the fact that double shift operations may be required which would result in the man doing twice the normal work that he would do. Under these circumstances I think we would recognize a reasonable increase in his salary, which increases, however, must be approved by the Constructing Quartermaster.

Mr. Dunn: We had understood that.

Mr. Loving: Mr. Dunn, have you handled other work on a cost-plus basis on which you placed your equipment on a rental basis?

Mr. Dunn: Yes, we have done that.

[fol. 129] Mr. Loving: Have you in general followed the rental schedule established by the Associated General Contractors which is recognized and considered by both owners, clients, engineers, architects and suppliers of equipment as being the best standard available at this time.

Mr. Dunn: In general, that has been our rule.

Mr. Loving: In such instances has the lessee of the equipment paid the freight both ways?

Mr. Dunn: Yes, sir.

Mr. Loving: You would expect that in this instance?

Mr. Dunn: Yes Sir.

Mr. Loving: There are certain formalities that must be gone through from now on, Mr. Dunn, the first being to secure the clearance of our negotiated agreement by the National Defense Council. It is hoped that this may be accomplished tomorrow and that the contract may be ready for execution, we hope, by tomorrow. Is it your plan to remain in the city until that is accomplished?

Mr. Dunn: If you think it will be done tomorrow, I will be mighty glad to remain in the city. Mr. Hodgson will remain anyway, whether I go home or not. If I go home tomorrow I will return Sunday nite and be here Monday morning. I would prefer to do that, but I don't want to delay this. I would like to say that I am subject to your orders or wishes in this matter.

Mr. Loving: Under the conditions we anticipate may arise I think if you are back by Monday morning that will be sufficiently early. Before we adjourn, I want to ask that you hold this meeting in strict confidence and no not announce to anyone that you have been selected, subject to the approval of the National Defense Council and The Assistant Secretary of War until after the contract has actually been executed.

Mr. Dunn: We will be glad to do that, sir.

EXHIBIT "E"

WBH/SEB

February 8, 1941.

Memorandum To:)

Dunn Construction Company, Inc.,
 John S. Hodgson & Company,
 Fort McClellan, Alabama.

1. Attached is a list of your Administrative and Field Overhead as of February 1, 1941. With the Project in the finishing stages and with the field force so greatly reduced, it is the opinion of this office that the high price overhead is entirely out of line.

[fol. 130] 2. It is requested that steps be taken to reduce this administrative and field overhead.

(S.) Wm. H. Bell, Jr., Major, QMC, Constructing Quartermaster.

EXHIBIT "F"

DBJ/esh

War Department

Office of the Constructing Quartermaster

Fort McClellan, Alabama

November 14, 1940.

In Reply Refer to QM 248.

Subject: Over-time for Sheet Metal Workers.

Memorandum to:

Dunn Construction Co. and
 John S. Hodgson Co.
 Fort McClellan, Ala.

1. Due to the severe cold weather and the immediate necessity for heat in such buildings as are now occupied by

troops, and due to the limited number of sheet metal workers available, you are authorized to work sheet metal workers over-time to the extent that is necessary to take care of the present emergency.

For the Constructing Quartermaster.

(S.) Dudley B. Jones, Capt. (FA) QM-Res. Executive Officer.

cc to Mr. Spicer.

Certified. A true copy.

Thomas H. Doyle, Captain, Q.M.C., Constructing Quartermaster.

EXHIBIT "G"

MPA/SEB

War Department

Office of the Constructing Quartermaster

Fort McClellan, Alabama

November 12, 1940.

In reply refer to

Dunn Construction Company, Inc.,
John S. Hodgson & Company
Fort McClellan, Alabama.

1. This is to inform you that all wages with the exception of office help paid for Armistice Day, November 11th, are to be calculated at time and one-half.

[fol. 131] (S.) S. C. MacIntire, Jr., Major, QM-Res.,
Constructing Quartermaster.

Certified a true copy.

Thomas H. Doyle, Captain, Q. M. C., Constructing Quartermaster.

EXHIBIT "H"**Dunn Construction Co., Inc.****and****John S. Hodgson & Co.****Contractors****Fort McClellan, Alabama****February 17, 1941.****Major Wm. H. Bell, Jr., Constructing Quartermaster, Fort
McClellan, Alabama.****DEAR SIR:**

Permission is hereby requested for electricians to work overtime as of this date to install motor in the Asphalt Plant.

Very truly yours, Dunn Construction Co., Inc., and
John S. Hodgson & Company. By (S.) G. H.
Stout, Project Manager.

GHS/gp:**Certified a true copy.**

**Thomas H. Doyle, Captain, Q. M. C., Constructing
Quartermaster.**

EXHIBIT "I"**War Department****Office of the Constructing Quartermaster****Fort McClellan, Alabama****February 17, 1941.****In reply refer to****Memorandum To:**

**Dunn Construction Company, Inc., John S. Hodgson & Com-
pany, Fort McClellan, Alabama.**

**1. You are authorized to work electricians overtime to in-
stall the motor in the Asphalt Plant.**

**(S.) Wm. H. Bell, Jr., Major, QMC, Constructing
Quartermaster.**

Certified a true copy.

**Thomas H. Doyle, Captain, Q. M. C., Constructing
Quartermaster.**

[fol. 132] IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

ORDER OF SUBMISSION

This cause coming on to be heard, is submitted for final decree upon pleadings and proof as noted by the Register. June 13, 1941.

Walter B. Jones, Judge.

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

NOTE OF SUBMISSION

Complainant, being called, offers the following testimony, to-wit:

1st. Notice of appeal from final assessment for sales taxes from January 1, 1941, to March 31, 1941, etc.

2nd. Transcript of record from State Department of Revenue, and amendment thereto.

3rd. Supersedeas Bond and Appeal Bond to Circuit Court, In Equity.

4th. Bill of Complaint or Petition, filed May 29, 1941.

5th. Agreed Statement of Facts.

6th. Testimony of Major S. C. MacIntire, Capt. Thomas H. Doyle and Mr. John S. Hodgson, taken orally before the Court, and exhibits thereto.

Defendant, State of Alabama, being also called, offers the following testimony, to-wit:

1st. Transcript of record from State Department of Revenue, and amendment thereto.

2nd. Exceptions and motion to strike petition of United States of America to intervene.

3rd. Demurrer and answer to Petition of Intervention filed by United States.

4th. Demurrer and answer to Bill of Complaint or petition of Complainant.

5th. Agreed Statement of Facts.

6th. Testimony of Complainant's witnesses on cross-examination.

Intervener, United States of America, being called, offers:

1st. Petition to intervene and Order allowing same.

2nd. Petition of Intervention of United States of America.

[fol. 133] 3. Testimony of Major S. C. MacIntire, Capt. Thomas H. Doyle and Mr. John S. Hodgson, taken orally before the Court, and Exhibits thereto.

I hereby certify that the above Note of Testimony is correct, this 13th day of June, 1941.

Geo. H. Jones, Jr., Register. Fred L. Blackman, Knox, Liles, Jones & Blackman, Solicitors for Appellant. Thomas S. Lawson, Attorney General. John W. Lapsley, Assistant Attorney General. J. Edward Thornton, Assistant Attorney General, Solicitors for Appellee. United States of America as Intervener. By: Thomas D. Samford, United States Attorney, and Hartwell Davis, Assistant United States Attorney, as Solicitors for Intervener.

[File endorsement omitted.]

IN CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA,
IN EQUITY

KING & BOOZER, a Partnership Composed of Tom Cobb King and Simon Elbert Boozer, residents of Calhoun County, Alabama, Appellant

VS.

THE STATE OF ALABAMA, Appellee

FINAL DECREE—Filed June 13, 1941

This cause coming on to be heard was submitted for a final decree on May 29, 1941, upon the petition of the appellant, and the answer of the appellee thereto, petition of the Intervener, and answer thereto, and the testimony as noted by the Register, including a stipulation in writing made by

the parties to this cause and filed herein; and it appearing to the Court that the assessment made by the State Department of Revenue of the State of Alabama against said appellant on the 15th day of May, 1941, in the amount of \$1,236.71 tax for the period from January 1, 1941, through March 31, 1941, \$123.67 penalty thereon, together with interest thereon as shown by said assessment, for sales taxes [fol. 134] ascertained and determined to be due by said appellant to the State of Alabama under the provisions of the Alabama Sales Tax Act, Act No. 18 of the General Acts of Alabama of 1939, approved February 8, 1939, from which assessment an appeal was taken by the appellant to this Court, was validly made; that neither the levy nor assessment of said tax by the State of Alabama against the appellant for said period nor any provision in said Act for the passing on or collection of said tax or the amount thereof by appellant from Dunn Construction Company, Inc., and John S. Hodgson and Company, under the facts and circumstances shown in this cause, for the period involved in said assessment, was contrary to any provision, express or implied, of the Constitution of the United States of America, or in violation of any right or immunity of the United States of America; that neither said Dunn Construction Company, Inc., nor John S. Hodgson and Company, whether acting separately or jointly, was, during the period covered by said assessment, an agent or instrumentality of the United States; nor does it appear that the imposition of said tax constituted a prohibited interference with the performance by said Dunn Construction Company, Inc., and John S. Hodgson and Company of the contract executed by and between them and the United States of America under date of September 9, 1940, and in connection with the performance of which contract said contractors purchased from appellant at retail within the State of Alabama certain tangible personal property, the gross proceeds from the sale of which was included within the computation of the tax liability of appellant for said period under the terms and provisions of said Act; that neither said Act nor said assessment imposed a direct burden upon the United States and that such burden as is imposed upon the United States with respect to such tax is remote and consequential, for the amount of which the United States expressly agreed to reimburse said contractors as a part of the costs of the

construction provided for under the terms of said contract. It is, therefore,

Ordered, Adjudged and Decreed by the Court:

1. That the assessment made by the State Department of Revenue of Alabama on May 15, 1941, against King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, for an additional amount of sales tax for the period beginning January 1, 1941, and ending March 31, 1941, in the sum of \$1,236.71 tax, and \$123.67 penalty thereon, together with interest upon the amount of said tax from April 20, 1941, is in all things sustained and confirmed, for which execution may issue as provided by law.

[fol. 135] 2. That the costs of this appeal, to be taxed by the Register be paid by the appellant, King & Boozer, for which execution may issue.

Done this the 13 day of June, 1941.

Walter B. Jones, Circuit Judge.

[File endorsement omitted.]

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed June 16, 1941

Comes Now King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, residents of Calhoun County, Alabama, Appellants, and the United States of America, Intervener, in the above-styled case, and give notice that an appeal is taken from a decree entered in this cause on the 13th day of June, 1941.

Done this 16th day of June, 1941.

Fred L. Blackmon, Knox, Liles, Jones & Blackmon,
Solicitor for Appellants. United States of America,
by Thomas D. Samford, United States Attorney.

[fol. 136] Citation in usual form showing service on Thomas A. Lawson, omitted in printing.

[fols. 137-138] Supersedeas and cost bond on appeal for \$3,000 approved and filed June 16, 1941, omitted in printing.

[fol. 139] IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

CERTIFICATE OF APPEAL

I, Geo. H. Jones, Jr., Register of the Circuit Court of Montgomery County, Alabama, In Equity, do hereby certify that an appeal was taken in the above stated cause on the 16th day of June, 1941, by the Complainant and Intervener, from a decree rendered in said cause on the 13th day of June, 1941, to the Supreme Court of the State of Alabama, and that said appeal is made returnable to the present term of said Court.

I further certify that King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, is principal, and National Surety Corporation is surety on Supersedeas Bond and Security for costs of appeal.

Given under my hand and seal of office, this the 17th day of June, 1941.

Geo. H. Jones, Jr., Register of the Circuit Court of Montgomery County, Alabama, In Equity.

[fol. 140] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 141] IN SUPREME COURT OF ALABAMA

KING & BOOZER, a partnership composed of Tom Cobb King and Simon Elbert Boozer, residents of Calhoun County, Alabama, Appellant

VS.

THE STATE OF ALABAMA, Appellee

THE UNITED STATES OF AMERICA, Intervener

ASSIGNMENTS OF ERROR

The Circuit Court erred:

(1) In holding that the assessment made by the State Department of Revenue for the State of Alabama on May

15, 1941, against King & Boozer, a partnership, for sales taxes in the amount of \$1,236.71 and penalty thereon of \$123.67, together with interest as shown by the assessment for the period from January 1, 1941, through March 31, 1941, was valid.

(2) In holding that neither the levy nor assessment of the additional tax, nor any provision of the Alabama Sales Tax Act, Act No. 18 of the General Acts of Alabama, 1939, approved February 8, 1939, for the passing on or the collection of the tax or the amount thereof from Dunn Construction Company, Inc., and John S. Hodgson & Company was contrary to any provision, express or implied, of the Constitution of the United States of America, or in violation of any right or immunity of the United States.

(3) In holding that neither the Dunn Construction Company, Inc., nor John S. Hodgson & Company, acting separately or jointly, was during the period covered by the assessment an agency or instrumentality of the United States.

(4) In holding that the imposition of the tax did not constitute a prohibited interference with the performance by Dunn Construction Company, Inc., and John S. Hodgson & Company of their contract with the United States dated September 9, 1940.

[fol. 142] (5) In holding that neither the Alabama statute under which the tax was purportedly levied nor the assessment imposed a direct burden on the United States.

(6) In holding that such burden as is imposed upon the United States by such tax is remote and consequential.

(7) In holding that the United States has expressly agreed to reimburse the contractor for such taxes as a part of the cost of the construction provided for under the terms of the contract.

(8) In sustaining and confirming the assessment made by the State Department of Revenue of Alabama on May 15, 1941, against King & Boozer, a partnership, for an additional amount of sales taxes for the period beginning January 1, 1941, and ending March 31, 1941, in the sum of \$1,236.71 tax and \$123.67 penalty thereon, together with interest upon the amount of the tax from April 20, 1941.

(9) In failing to hold that the assessment of May 15, 1941, was based upon sales by King & Boozer of tangible personal property to the United States or to the United States through Dunn Construction Company, Inc., and John S. Hodgson & Company as agents and instrumentalities of the United States in execution of the contract of September 9, 1940.

(10) In failing to hold that sales of tangible personal property to the United States or to the United States through Dunn Construction Company, Inc., and John S. Hodgson & Company are immune from taxation by the State of Alabama under the Constitution of the United States of America.

(11) In failing to hold that the sale of tangible personal property to the United States or to the United States through Dunn Construction Company, Inc., and John S. Hodgson & Company as agents and instrumentalities of the United States is exempt from taxation under Subsection (a) of Section 5 of the Act No. 18, of the Legislature of Alabama, Session of 1939, as approved February 8, 1939.

(12) In failing to hold that the sales of tangible personal property to the United States or to the United States through Dunn Construction Company, Inc., and John S. Hodgson & Company as agents and instrumentalities of the United States in execution of the contract of September 9, 1940, were consummated at Camp McClellan, Anniston, Alabama; that the camp is within an area within the exclusive jurisdiction of the United States; and that such sales are immune from taxation by the State of Alabama under the Constitution of the United States of America.

(13) In failing to hold that the State Department of Revenue of the State of Alabama in applying Act No. 18 of the General Acts of Alabama, 1939, aforesaid to the sales of tangible personal property to the United States or to the United States through Dunn Construction Company, Inc., and John S. Hodgson & Company as agents and instrumentalities of the United States have applied Act No. 18 in a manner which renders the Act invalid and void under the Constitution of the United States of America.

(14) In failing to hold that the Alabama Sales Tax Act, Act No. 18 of the General Acts of Alabama, 1939, approved February 8, 1939, insofar as it subjects to taxation the sales of tangible personal property to the United States or to the United States through Dunn Construction Company, Inc., and John S. Hodgson & Company as agents and instrumentalities of the United States is invalid and void because violative of the Constitution of the United States of America.

(15) In not adjudging and decreeing that the assessment of May 15, 1941, is illegal, contrary to law and null and void.

(Signed) Fred L. Blackmon, Knox, Liles, Jones & Blackmon, Attorney- for King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer.

Thomas D. Sanford, United States Attorney, Attorney for United States of America, Intervener.

[fol. 144] IN SUPREME COURT OF ALABAMA

Montgomery Circuit Court, In Equity

3 Div. 351

KING AND BOOZER, a Partnership composed of Tom Cobb King and Simon Elbert Boozer, United States of America, Intervener,

VS.

THE STATE OF ALABAMA

ORDER OF SUBMISSION—June 23, 1941

Come the parties by attorneys, and argue and submit this cause for decision with 3 Div. 350.

[fol. 145] IN SUPREME COURT OF ALABAMA

ORDER CALLING SPECIAL TERM OF COURT—July 28, 1941

It Is Ordered that a Special Term of the Supreme Court of Alabama be begun and held at the Judicial Building in Montgomery, Alabama, on Monday, July 28th, 1941, for

the purpose of considering and disposing of any and all matters as the Court may determine, and to continue in session from day to day until adjourned by the Court.

Lucien D. Gardner, Chief Justice; William H. Thomas, Associate Justice; Virgil Bouldin, Associate Justice; Joel B. Brown, Associate Justice; Arthur B. Foster, Associate Justice; — — —, Associate Justice; J. Ed. Livingston, Associate Justice.

[fol. 146] In compliance with the foregoing order, a Special Term of the Supreme Court was begun and holden according to law on July 28th, 1941.

Present as Justices of said Court:

Chief Justice Gardner and Associate Justices Thomas, Bouldin, Brown, Foster and Livingston.

Knight, J., not sitting.

Present as Officers of the Court:

Clerk, J. Render Thomas.

Marshal, Travis Williams.

The Supreme Court adjourned until Tuesday, July 29th, 1941, at 10 o'clock A. M. ———

[fol. 147] IN SUPREME COURT OF ALABAMA

Montgomery Circuit Court, In Equity

3 Div. 351

KING & BOOZER, a Partnership composed of Tom Cobb King and Simon Elbert Boozer, Residents of Calhoun County, Alabama (The United States of America, Intervener),

vs.

THE STATE OF ALABAMA

Present: Chief Justice Gardner and Associate Justices Thomas, Bouldin, Brown, Foster and Livingston.

Knight, J., not sitting.

DECREE—July 29, 1941

Come the parties by attorneys, and the record and matters therein assigned for errors, being argued and submitted and duly examined and understood by the Court, it is con-

sidered that in the record and proceedings of the Circuit Court there is manifest error. It is therefore considered and ordered that the decree of the Circuit Court be reversed and annulled, and this Court proceeding to render the decree that the Circuit Court should have rendered, doth order, adjudge, and decree that the final assessment made on the 15th day of May, 1941, under the provisions of the Alabama Sales Tax Act by the Department of Revenue against the Appellants, King & Boozer, a Partnership composed of Tom Cobb King and Simon Elbert Boozer, for sales tax for the period beginning January 1st, 1941, and ending March 31st, 1941, in the amount of \$1,236.71, and \$123.67 penalty thereon, and interest in the amount of \$12.37, making a total amount of \$1,372.75, be and the same is hereby set aside, vacated and declared to be void and of no effect, and it is further ordered, adjudged and decreed that the Appellants are not liable for said tax, penalty and interest thereon.

It is also considered, ordered, adjudged and decreed that the costs of appeal of this Court and all of the costs of the [fol. 148] Circuit Court be taxed against the Appellee, The State of Alabama.

[fol. 149] IN SUPREME COURT OF ALABAMA

Special Term 1941

3 Div. 351

KING AND BOOZER

vs.

STATE OF ALABAMA

Appeal from Montgomery Circuit Court, In Equity

OPINION

LIVINGSTON, Justice.

This is an appeal from a decree of the Circuit Court of Montgomery County, In Equity, confirming an assessment made by the State Department of Revenue on May 15, 1941, against King and Boozer, a partnership composed

of Tom Cobb King and Simon Elbert Boozer, for sales taxes for the period beginning January 1, 1941, and ending March 31, 1941, in the sum of \$1236.71 tax and \$123.67 penalty thereon. The decree of the circuit court was entered on June 13, 1941, and the appeal therefrom to this Court was duly perfected on June 16, 1941.

The tax here involved was assessed under the provisions of the Alabama Sales Tax Act (General Acts 1939, page 16) on the gross proceeds of sales of tangible personal property, consisting of lumber purchased from King and Boozer in connection with the performance of a contract entered into by Dunn Construction Company, a corporation, and John S. Hodgson and Company, a partnership, [fol. 150] jointly performing the contract, and hereinafter called the contractor, with the United States of America, hereinafter called the Government, on September 9, 1940, for the construction of a complete tent camp, including necessary buildings, temporary structures, utilities and appurtenances thereto at Fort McClellan, Alabama.

The facts necessary for the decision are, in addition to the above, substantially as follows:

The contract between the Government and the contractor is designated as a cost-plus fixed-fee construction contract. It states that the estimated total cost of construction work to be in the approximate amount of \$3,204,588, exclusive of the contractor's fee, subject to the express understanding that the contractor does not guarantee the correctness of the estimate, which is recited to be based upon a detail estimate agreed upon by both the Government and the contractor. The contract states that a fixed fee of \$128,865 is to be paid to the contractor, which shall constitute complete compensation for the contractor's services including profit and all general overhead expenses.

The contract provides that the contractor shall furnish all labor, materials, tools, machinery, equipment, facilities and supplies not furnished by the Government, and shall do all things necessary for the completion of the work in accordance with the drawings, specifications and instructions contained in the contract, or to be furnished by the contracting officer,—the officer who executed the contract on the part of the Government and who was in charge of the construction work, by or through his authorized representative.

The contract further provides that in addition to the payment of the contractor's fixed fee, the contractor shall be reimbursed for such of his actual expenditures in the performance of the work as may be approved and ratified by the contracting officer, and for payment of rental to the contractor for the construction plant or parts thereof or tools or equipment as the contractor may furnish or rent from others, not to exceed the rates approved by the contracting officer.

[fol. 151] The orders for materials and supplies were placed by the contractor, but the Government reserved the right to furnish any materials, construction, equipment, machinery, or tools necessary for the completion of the work, and to pay directly to the persons concerned all sums due from the contractor for labor, materials, freight charges and other charges.

With respect to the payment of costs, the contract provides that the Government will currently reimburse the contractor upon certification to and verification by the contracting officer of the original papers governing pay-rolls for labor, invoices for materials, and other expenditures. Generally, reimbursements are to be made weekly, but may be made more frequently if conditions warrant.

The contract further provides that title to all work, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work, or at an approved storage site, and upon inspection and acceptance in writing by the contracting officer, title to all materials, tools, machinery, equipment and supplies, for which the contractor shall be entitled to reimbursement, is to vest in the Government. These provisions as to title being vested in the Government shall not operate to relieve the contractor from any duties imposed under the terms of the contract.

It is further provided by the contract that the contracting officer is authorized at any time to make changes in or additions to the drawings and specifications, to issue additional instructions, require additional work or to direct the omission of work covered by the contract. If such changes cause a material increase or decrease in the amount or character of the work, or in time required for its performance, an equitable adjustment of the amount of the fixed fee to be paid to the contractor shall be made, and the contract shall be modified in writing accordingly. It

is also required by the contract that, unless the contracting officer shall waive in writing the requirement, the contractor shall reduce to writing every contract in excess of \$2,000 made by him for the purpose of the work for services, materials, supplies, machinery, or equipment: insert therein a provision that such contract is assignable to the Government: make all contracts in his own name, and not bind or purport to bind the Government or the contracting officer; and make or place no purchases in excess of \$500 [fol. 152] without the prior approval of the contracting officer.

That the contractor shall keep records and books of account, showing actual cost to him of all items of labor, materials, equipment, supplies, services and other expenditures of whatever nature for which reimbursement is authorized under the provisions of the contract, and that the contracting officer shall at all times be afforded proper facilities for inspection of the work, and shall at all times have access to the premises, work, materials, books, records, correspondence, instructions, plans, drawings, receipts, vouchers, and memoranda of every description of the contractor pertaining to the work.

The contract further provides that the contractor shall be reimbursed for payments made by the contractor from his own funds under the Social Security Act, and any applicable state or local taxes, fees, or charges which the contractor may be required on account of the contract to pay on or for any plant, equipment, process, materials, supplies or personnel; and, subject to advance approval by the contracting officer, permit and license fees, and royalties on patents used, including those owned by the contractor.

Under the terms of the contract the contractor shall take advantage of all such benefits as cash and trades discounts, rebates, allowances, credits, salvage, commissions, etc., and that in determining the actual net cost of articles and materials, such benefits shall be deducted from the gross cost thereof.

The record contains in substance the following stipulation of facts: Prior to January 1, 1941, a proposal was submitted by King and Boozer in writing to the contractor to sell large quantities of prefabricated lumber at a stipulated price for use in the performance by the contractor of his contract with the Government of September 9, 1940. This proposal was submitted by the contractor to the con-

structing quartermaster, the authorized representative of the contracting officer at Fort McClellan for his approval and was approved by him. It was stipulated and agreed that all of the sales by King and Boozer of tangible personal property which are involved herein were made in connection with the performance by the contractor of his contract of September 9, 1940, and that the property was sold, [fol. 153] paid for, and reimbursement made therefor in the manner stated hereinafter with respect to a particular purchase made on January 17, 1941.

Pursuant to the proposal submitted by King and Boozer, the contractor, on January 16, 1941, prepared and submitted to the constructing quartermaster a request for the purchase of certain lumber, and requested the approval by the constructing quartermaster of the purchase. The approval of the constructing quartermaster was endorsed on the request for purchase. Thereafter, on January 17, 1941, the contractor submitted to King and Boozer at Anniston, Alabama, an order for the lumber. As shown by a copy of the order, it was signed by the purchasing agent of the contractor and directed that the materials described in the order should be shipped to the United States Construction Quartermaster at Fort McClellan, Alabama, for account of Dunn Construction Company, Inc., and John S. Hodgson and Company, f. o. b., Fort McClellan. The order further provided as follows:

"This order is placed for the benefit of, and is assignable to, the United States Government.

"This purchase order does not bind, nor purport to bind, the United States Government or Government officers thereunder.

"Terms of Payment as stated on obverse side of this purchase order are understood to be effective upon arrival at destination and acceptance of material by properly accredited U. S. Government officers or representatives having jurisdiction over same, and of properly executed bills of lading (or shipping papers) and receipt of certified invoice."

The purchase order further provided that bills of lading, etc., must read "United States Constructing Quartermaster at Fort McClellan, Alabama. Account of Dunn Construction Company, Inc., and John S. Hodgson and Company."

The purchase order also provided that copies of the invoice should be properly filled out and certified as follows:

[fol. 154] "I certify that the above bill is correct and just; that payment therefor has not been received; and that except as noted below or otherwise indicated herein all unmanufactured articles, materials, or supplies furnished under this invoice have been mined or produced in the United States and all manufactured articles, materials or supplies have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States; and that state or local sales taxes are not included in the amounts billed."

Upon receipt of the purchase order, King and Boozer loaded at its plant or principal place of business at Anniston, Alabama, the material ordered upon trucks operated by a contract carrier engaged by it for the purpose of transporting the lumber from its place of business at Anniston to a designated point within Fort McClellan. At the time King and Boozer loaded the lumber upon the trucks of the contract carrier, the materials were checked and inspected and two reports were made. One report was required to be made by the constructing quartermaster and was signed by an employee of the contractor and by an employee of the United States representing the constructing quartermaster. The other report was a report made to the contractor, and was signed by an employee of the contractor and by an employee of the United States representing the constructing quartermaster.

On January 18, 1941, King and Boozer delivered to the contractor an original invoice on account of the purchase of materials described in the purchase order of January 17, 1941. On January 21, 1941, this invoice, along with others not involved in this case, was transmitted to the constructing quartermaster at Fort McClellan, Alabama, for his approval for payment by the contractor of the invoice. On January 29, 1941, the constructing quartermaster approved the invoice for payment. Thereafter, but prior to February 3, 1941, the contractor issued his check to King and Boozer in full payment of the invoice mentioned above, in the amount of \$68.23, being the amount of \$68.40 less one-fourth

of one percent. discount, which check upon presentation was paid in due course.

[fol. 155] Thereafter, on February 3, 1941, the contractor submitted a voucher to the United States War Department, through the constructing quartermaster at Fort McClellan for reimbursement for expenditures by it aggregating \$1,991.62, including its expenditure of \$68.23 made to King and Boozer as stated above. This voucher did not include any amount for Alabama sales taxes, no such tax having been paid by the contractor or by King and Boozer.

The field auditor of the constructing quartermaster and the constructing quartermaster approved the voucher for payment, and on February 5, 1941, the voucher was paid by the finance officer at Fort McClellan to the contractor by the United States Government's check.

In submitting for payment the voucher mentioned above, the contractor attached thereto its request made to the constructing quartermaster for approval of the purchase, bearing approval of the constructing quartermaster for the purchase, copies of its purchase order to King and Boozer, the two receiving and inspection reports, and the invoice of King and Boozer.

It was further stipulated that in the performance of the contract between the contractor and the Government, in some instances not involved in the assessment hereinabove mentioned, competitive bids for the material required for the performance of the contract* were called for by the quartermaster general of the United States with respect to various materials to be used in such performance, and that after the acceptance of one of the bids received in response to the call, the quartermaster general informed the constructing quartermaster and the contractor of such acceptance and requested or directed the contractor to purchase the materials from the competitive bidder for and in connection with the performance of the contractor's contract with the United States, which purchase was thereafter handled in the same manner as if the bid had been originally submitted to the contractor, and the materials were paid for by the contractor and bills for reimbursement were thereafter submitted, approved, and paid to the contractor in the same manner as in the case of the typical transaction hereinabove mentioned and described in detail. [fol. 156] It was further stipulated that Fort McClellan is located upon and constitutes an area situated in Calhoun

County in the State of Alabama, acquired by the United States of America in 1918 by purchase from the individual owners of such land; that since such acquisition thereof the United States has continuously used the area as a military reservation or fort; and that all of the buildings and improvements mentioned in the contract of September 9, 1940, were constructed or required to be constructed upon the area known as Fort McClellan.

It was stipulated and agreed that the constructing quartermaster at Fort McClellan was a representative at Fort McClellan of the contracting officer, C. D. Hartman, Brigadier General, Quartermaster Corps, United States Army, and that the constructing quartermaster was duly authorized to act for and on behalf of the United States and the contracting officer in all matters pertaining to the contract of September 9, 1940, between the United States and Dunn Construction Company, Inc., and John S. Hodgson and Company.

There was the further stipulation that King and Boozer had billed Dunn Construction Company, Inc., and John S. Hodgson and Company for the taxes, or for a sum equal to the amount of the taxes, assessed against King and Boozer which are involved in the present case, but which have not been paid.

The questions presented for decision are:

(1) Whether the purchases involved herein were made by or on behalf of the United States or by an agency or instrumentality of the United States, and, if so, whether such purchases are constitutionally immune from taxation by the State of Alabama under Act No. 18 of General Acts of Alabama of 1939 (page 16)?

(2) Whether the United States, in the construction contract here involved, consented to the imposition of sales taxes by the State of Alabama?

[Vol. 157] (3) Whether the State of Alabama possessed the territorial jurisdiction to impose the taxes here involved, dependent (a) upon whether the sales in controversy were consummated upon the area known as Fort McClellan, and (b) upon whether the Congress in Public No. 819, 76 Congress, approved October 9, 1940, expressly released and waived exclusive jurisdiction over Camp McClellan in so far as the transactions here in controversy are concerned?

(4) Whether the sales in controversy are exempted from tax by section V of Act No. 18 of the General Acts of Alabama of 1939 (page 16) ?

The contract between the Government and the contractor was authorized by an Act of Congress, providing for the national security and the acquisition of facilities and weapons of defense. Public 703, 76th Congress, approved July 2, 1940.

The General Act No. 18, General Acts of Alabama of 1939, (page 16) provides:

“Section II. There is hereby levied, in addition to all other taxes of every kind now imposed by law, and shall be collected as herein provided, a privilege or license tax against the person on account of the business activities and in the amount to be determined by the application of rates against gross sales, or gross receipts, as the case may be, as follows: (a) Upon every person, firm or corporation engaged, or continuing within this State, in business of selling at retail any tangible personal property whatsoever, including merchandise and commodities of every kind and character (not including, however, bonds or other evidences of debt or stocks), an amount equal to two per cent. (2%) of the gross proceeds of sales of the business except where a different amount is expressly provided herein. . . .

“Section V. Exemptions: There are however exempted from the provisions of this Act and from the computation of the amount of the tax levied, assessed or payable under this Act the following: (a) The gross proceeds of sales of tangible personal property or the gross receipts of any business which the State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State.”

[fol. 158] The nature of the tax is not determined by the name given to it, or by the use of some particular form of words, but by the substance and realistic impact of the tax; and while the tax here involved is denominated in section II as a privilege or license tax upon every person engaged in the business of selling tangible personal property at retail, determined by a stated percentage of gross proceeds

of sales, section XXVI makes it unlawful for any person to fail or refuse to add to the sales price and collect from the purchaser the amount due on the tax. The ultimate burden of the tax is thus passed on to the consumer, and in truth and in fact the tax can well be denominated a consumer's tax.—*Lone Star Cement Corp. v. State Tax Commission*, 234 Ala. 465, 175 So. 399; *Long v. Roberts*, 234 Ala. 570, 176 So. 213; *National Linen Service Corp. v. State Tax Commission*, 237 Ala. 360; *McPhillips M'f'g Co. v. Curry*, 2 So. (2d) 600. See, also, *McCallen Co. v. Massachusetts*, 279 U. S. 620; *New Jersey Tel. Co. v. Tax Board*, 280 U. S. 338; *Educational Films Corp. v. Ward*, 282 U. S. 378-387; *Lawrence v. State Tax Commission*, 286 U. S. 276; *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550; *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435.

There is no doubt but that a sale of material to the Government to be used in promoting its governmental enterprises can not be made the basis of a state sales tax.—*Panhandle Oil Co. v. Mississippi*, ex rel. *Knox*, 277 U. S. 218, 48 S. Ct. 451, 72 L. ed. 857; *Graves v. Texas Co.*, 298 U. S. 393, 56 S. Ct. 818, 80 L. ed. 1236.

In the *Panhandle Oil Company* case, *supra*, it is said that the State "may not lay any tax upon the transactions by which the United States secures the things desired for its governmental purposes." As to the case of *Graves v. Texas Company*, *supra*, this Court had held that the gasoline tax then in existence laid on a "storer" was due and payable when it was withdrawn from storage, and was measured by the amount so withdrawn.—*State v. City of Montgomery*, 228 Ala. 93, 151 So. 856. In the *Graves* case, *supra*, the minority of the United States Supreme Court held that the tax event had fully matured when there was a withdrawal from storage, and was then due and payable [fol. 159] by the storer, though it was sold to the United States for governmental purposes and could be passed on to the Government in the sale. But the majority of that court held that such a tax on storing and withdrawing is upon something essential to a sale to the United States and is as objectionable as it would be on the sale itself to the United States. This is of course upon the settled principle that neither the United States nor its instrumentalities which are engaged in carrying on its powers, can be taxed by a state so as to burden the Government directly or immediately.

It is true that sometimes a taxable event occurs of a local sort which has close and intimate relations to interstate commerce and on which a state may levy. But this is on the theory that interstate commerce must "pay its way," so that local transactions in close relation to such commerce may be locally taxed without discrimination, if such an event is not subject to a local tax in some other sovereignty. The prohibition of a state to tax interstate commerce is considered to exist only when such taxation interferes with that commerce, and should not be extended beyond the necessity of keeping interstate commerce free from interference.—*Cloverdale v. Ark-La Pipe Line Co.*, 303 U. S. 604, 58 S. Ct. 736; *So. Pac. Rwy. Co. v. Gallagher*, 306 U. S. 167, 59 S. Ct. 389; *Western Livestock Co. v. Bureau of Revenue*, 303 U. S. 250, 58 S. Ct. 546.

But the United States is not under the principle of "paying its way" in respect to taxation. And while there may be a local taxable event in the continuous flow of commerce between the states, there can not be a distinct taxable event in the continuous flow of circumstances by which the Government acquires the thing desired for its purposes. The imaginary contemplation of such event applicable to interstate commerce does not exist, because such commerce may be burdened so long as it is not interfered with, whereas no burden can be directly laid upon the activities of the Government. But this does not prohibit the levy by a state of nondiscriminatory taxes on the machinery, equipment and gasoline used by an independent contractor in the performance of his contract with the Government.—*Trinity Farm Construction Co. v. Grosjean*, 291 U. S. 466, 54 S. Ct. 469, 78 L. ed. 918.

[fol. 160] It is said that there is no exact formula applicable to all cases where an instrumentality is used by the Government, by which to determine whether it is immune from taxation on this principle. But if it is of such character as to be intimately connected with the exercise of a power or the performance of a duty by the Government, any taxation of it by a state which would be a direct interference with the functions of the Government would be plainly beyond the taxing power.—*Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 46 S. Ct. 172, 70 L. ed. 384.

This does not inhibit the laying of a tax by a state on the income of an agent, officer, employee, or other instrumentality of the Government, which he may derive from

such employment, and which has come into his personal ownership free from Government control in connection with such agency.—*Graves v. N. Y. ex rel. O'Keefe*, 306 U. S. 466, 59 S. Ct. 595, 83 L. ed. 929, 120 A. L. R. 1466; *Western Rwy. Co. v. State*, MSS.

And the fact that in his or its relations with the Government, the burden of the anticipated tax may be passed on economically to the Government through its effect on the price level of labor and material, is but a normal incident of the situation.—*Graves v. New York, ex rel. O'Keefe*, *supra*.

But when the incidence of the tax, as such, falls directly upon the Government to the extent that it is required to pay a tax in that form to the State, arising from the nature of its contract, the situation is different from one in which such tax is hidden in the price levels, and loses itself as a tax as where it is but a part of the overhead and other factors which enter into the fixation of such prices.

The contractor here was acting for the Government in the accomplishment of a governmental purpose. His acts were all under the immediate and direct supervision of the governmental authorities. His contract partakes of the nature in some respects of an independent contractor, and in some of an agency of the Government. It is not necessary here to define the exact status in respect to all his dealings, whether an independent contractor or an [fol. 161] agency under employment of the United States. The question here is whether a sales tax is in essence laid on a transaction by which the United States secures the things desired for governmental purposes. The title to the material went immediately into the United States and this was accomplished in a single transaction. The contractor did not buy nor sell, as a dealer, on his own account.—12 *Corpus Juris Secundum* 8, Section 2.

The transactions of a broker may by contract be such as that the title of the property will or will not pass through him (though usually it does not), and he may by contract collect from the consumer; but he does not deal on his own account.—12 *Corpus Juris Secundum* 74, Section 29; 9 *Amer. Jur.* 1013, Section 54, page 1014, Section 56. The incident in his relations most important in determining his status is whether he is dealing for himself or for another.—12 *Corpus Juris Secundum* 8, section 2. An independent building contractor is usually dealing on his

own account, and the materials and supplies remain in his ownership until they are affixed to the land. But by agreement the materials may become the property of the owner before they are affixed to the land.—17 Corpus Juris Secundum 1110, 1111, Section 516; 9 Corpus Juris Secundum 732, section 71.

So that whether this contractor as to the materials, occupies a status similar to that of a broker, or of an independent contractor, is not controlled by the circumstances that he pays for it in the first place, or that the title immediately passes to the Government without any stoppage in him for any purpose.

Under the contract here involved, the Government was to, and did, acquire the title to the things desired for its governmental purposes. The contractor took for the Government an essential step in the transaction by which such title was acquired. The contractor was not acting for himself in doing so, though he was in name the purchaser, and though indebted for the agreed price. He had no power of disposition of the property, but to use it on this project. He did not use it as his own property, but as the property of the Government, which was to pay him the exact amount of its purchase price which he paid, or was obligated to pay. He could not make a charge for it of an amount in excess of its cost to him. His only interest [fol. 162] in the material was that its quality and amount (perhaps its price, if over \$500) was to be satisfactory to the Government.

Article II (m) of the contract here involved, dealing with the reimbursement of the contractor for his expenditures, provides as follows:

“Payments made by the contractor from his own funds under the Social Security Act, and any applicable state or local taxes, fees, or charges which the contractor may be required on account of this contract to pay on or for any plant, equipment, process, materials, supplies, or personnel; and, subject to advance approval by the contracting officer, permit and license fees, and royalties on patents used, including those owned by the contractor.”

The State of Alabama contends that by this provision of the contract, the Government consented to the imposition of the tax which is involved in this case. This provision of the contract relates only to the reimbursement

of the contractor for applicable State taxes which the contractor may be required to pay. It does not deal with the waiver of any immunity of the Government; and there is no indication of a purpose to acquiesce in the levying of improper or invalid taxes.

The contracting officer could not waive the immunity. The Supreme Court of the United States in the recent case of *The Royal Indemnity Co. v. United States*, 61 S. Ct. 995, speaking through Mr. Justice Stone, now Chief Justice, said: "Power to release or otherwise dispose of the rights and property of the United States is lodged in Congress by the Constitution.—Article IV, section 3, cl. 2. Subordinate officers of the United States are without that power, save only as it has been conferred upon them by Act of Congress, or as it is implied from other powers so granted."

The further argument is, that bill H. R. 8438, relating to appropriations for the Navy Department for the fiscal year 1941 contained a provision authorizing the use of the cost-plus fixed-fee contracts. To the bill, the Senate added an amendment, No. 120, providing that all contractors who enter into cost-plus fixed-fee contracts shall, in the discretion of the Secretary of the Navy, be held to be agents of the United States for the purposes of such contracts, and that all purchases under such contracts shall be exempt from federal, state and local taxes. The [fol. 163] amendment was defeated in the House (Cong. Record, Vol. 86, part 7, pp. 7532-35), and the Senate concurred (Cong. Record, Vol. 86, part 7, p. 7648).

The Acts of Congress under which the contract here involved was amended, were enacted on June 13, 1940, and July 2, 1940, subsequent to the defeat of Senate amendment No. 120 to the Navy Appropriations Bill, and the State contends that Congress was aware of the tax reimbursement provisions in the cost-plus fixed-fee contract at the time of the adoption of these acts, and in expressly authorizing such form of contract, including such provision, Congress approved the tax clause therein and intended to permit the contractor to pay State taxes. In other words, such action by the Congress waived the tax immunity of the Government and its instrumentalities.

The Congress has the power to waive the immunity from state taxation which would otherwise attach to federal instrumentalities and transactions. But, as was said in

the case of *Austin v. The Alderman*, 7 Wall. 694, "The waiver must be clear, and every well grounded doubt upon the subject be resolved in favor of the exemption." See, also, *Farmers Bank v. Minnesota*, 232 U. S. 516.

There can be no doubt but that the immunity exists if the purchases here involved were made by the Government or its agents or instrumentalities. The mere silence of Congress on the question of immunity of cost-plus fixed-fee contracts falls far short of being a waiver of the long established tax immunity of the Federal Government and its instrumentalities.

The conclusion is inescapable that the burden of the tax in the instant case falls directly and immediately upon the Government. The addition of the tax raises the cost of construction which the Government is bound to pay. It in no wise affects the fixed fee of the contractor. This is so irrespective of the agreement to pay applicable taxes.

In view of the foregoing, other questions presented are not here discussed, as they are unnecessary to a decision in this case.

Reversed and rendered.

Gardner, C. J., Thomas, Bouldin and Foster, JJ., concur. [fol. 164] Brown, J., dissents, being of the opinion the decree of the lower court is correct and should be affirmed.

Knight, J., not sitting.

DISSENTING OPINION

BROWN, Justice (dissenting):

The material—lumber—in question was sold by the appellants, King and Boozer, to Dunn Construction Company, Inc., and John S. Hodgson and Company, independent contractors under contract with the United States to construct buildings at Camp McClellan, near Anniston, Alabama. The contract between said contractors and the United States provides: "That the contractor *shall furnish* all labor, *material*, tools, machinery, equipment facilities and supplies necessary for the completion of the work."—[Italics supplied.]

General Act No. 18, General Acts of Alabama, 1939, page 16, levies the tax, not on the government or its instrumentalities, but on persons engaged in the business of selling,

and the tax is merged into the price, as a part thereof.—*Lone Star Cement Corporation et al. v. State Tax Commission et al.*, 234 Ala. 465, 175 So. 399.

While it is true that the purchaser—consumer—ultimately pays the tax, that is true of all taxes which are added in as overhead expense in doing business.

The tax is not levied on the material—the lumber—nor on the title thereof, but on the privilege of selling and if the seller does not include the tax in the price of the sale, he alone is liable. The levy affirmed by the Circuit Court was against, King and Boozer, not against the government.

The mere fact that the material goes into government buildings, does not convert the statute into a levy against the United States. The liability for the tax is fixed when the sale is made, and the lumber in the instant case was delivered at the place of intended use to the account of the contractor.

In my opinion the Circuit Court did not err in affirming the levy, and the judgment should be affirmed.

I therefore, respectfully dissent.

[fol. 165] IN SUPREME COURT OF ALABAMA

[Title omitted]

PETITION FOR STAY OF DECREE

To the Honorable Chief Justice and the Associate Justices
of the Supreme Court of Alabama:

Comes The State of Alabama, Appellee in the above
styled cause, and respectfully shows unto this Court as
follows:

1. That on the 29th day of July, 1941, this Court, in the above styled cause, rendered an opinion and entered a final decree reversing the decision and decree of the Circuit Court of Montgomery County, Alabama, In Equity, and rendering a final decree in said cause in favor of Appellants and against this Petitioner.

2. That this Petitioner, being dissatisfied with said final decree, desires and intends to apply to the Supreme Court of the United States for a writ of certiorari to be directed

to this Court ordering and directing that the record in this case be certified to it for the purpose of reviewing the same.

3. That said Petitioner is allowed by law three (3) months after the entry of said final decree on the 29th day of July, 1941, in which to make application for such writ.

Wherefore, Petitioner prays that a stay of said decree and the execution and enforcement thereof for a period of three (3) months from the 29th day of July, 1941, or for such further and additional time as may be necessary to enable the Petitioner to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, be [fol. 166] granted by this Court for the purpose of allowing the Petitioner to apply for and obtain such writ; and the Petitioner further prays that the issuance of the certificate to the Circuit Court be stayed during said period, and that if the same has already issued, that it be recalled by this Court.

(Signed) Thomas S. Lawson, Attorney General;
John W. Lapsley, Assistant Attorney General; J.
Edward Thornton, Assistant Attorney General,
Attorneys for Petitioner.

Petition filed and granted this the 2nd day of August, 1941, without bond or security. It is, therefore, ordered that said final decree and the execution and enforcement thereof be and the same is hereby stayed for a period of three months from the 29th day of July, 1941, or for such further and additional time as may be necessary to enable the Petitioner to apply for and obtain a writ of certiorari from the Supreme Court of the United States, and that the certificate be recalled from the Circuit Court during such period.

(Signed) Lucien D. Gardner, Chief Justice of the
Supreme Court of Alabama.

I hereby certify that I have this the 2nd day of August, 1941, mailed a copy of the foregoing petition and order, postage prepaid, to Fred L. Blackmon, Esquire, Anniston, Alabama, Samuel O. Clark, Jr., Esquire, Department of Justice, Washington, D. C., Thomas D. Samford, Esquire, Montgomery, Alabama, Attorneys of record for Appellant.

(Signed) John W. Lapsley, Assistant Attorney General.

[fol. 167] IN SUPREME COURT OF ALABAMA

[Title omitted]

ORDER STAYING DECREE—August 2, 1941

Comes the Petitioner, State of Alabama, by its Attorneys, and the Petition praying that a stay of the decree of the Supreme Court of Alabama and the execution and enforcement thereof for a period of three (3) months from the 29th day of July, 1941, or for such further and additional time as may be necessary to enable Petitioner to apply for and to obtain a Writ of Certiorari from the Supreme Court of the United States, and further praying that the certificate to the Circuit Court, In Equity, be recalled pending application for Writ of Certiorari to the Supreme Court of the United States, being duly examined and understood, it is considered and ordered that the Petition be and the same is hereby granted without bond or security. It is therefore ordered that the said final decree and the execution and enforcement thereof be and the same is hereby stayed for a period of three (3) months from the 29th day of July, 1941, or for such further and additional time as may be necessary to enable the Petitioner to apply for and obtain a Writ of Certiorari from the Supreme Court of the United States, and that the certificate be recalled from the Circuit Court during such period.

(Signed) Lucien D. Gardner, Chief Justice of the
Supreme Court of Alabama.

[fol. 168] IN SUPREME COURT OF ALABAMA

CERTIFICATE OF RECALL PENDING APPLICATION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Register of the Circuit Court of Montgomery
County, Greeting:

Whereas, in the matter of King and Boozer, Appellant, v. State of Alabama, Appellee, recently pending in the Supreme Court of Alabama, on appeal from the said Circuit Court of Montgomery County, our Supreme Court did on the 29th day of July, 1941, render a decree of Reversal and Rendition in said cause; and,

Whereas, a certificate of such action of the Supreme Court was duly issued to you, and thereafter a Petition to stay the decree and the execution and enforcement thereof was filed in this Court on the 2nd day of August, 1941; said Petition being granted on said date.

Now, it is hereby certified, that our Supreme Court, or one of the Justices thereof, did, on the 2nd day of August, 1941, order that said certificate be recalled. And you will accordingly return the same to this office at once, together with copy of the opinion in said cause issued to you, pending application for Writ of Certiorari to the Supreme Court of the United States.

Witness, J. Render Thomas, Clerk of the Supreme Court of Alabama, this the 4th day of August, 1941.
(Signed) J. Render Thomas, Clerk of the Supreme Court of Alabama.

[fol. 169] Clerk's Certificate to foregoing transcript omitted in printing.

Endorsed on cover: Enter Thos. S. Lawson. File No. 45,930, Alabama, Supreme Court, Term No. 602. State of Alabama, Petitioner, vs. King and Boozer, a Partnership Composed of Tom Cobb King and Simon Elbert Boozer, and United States of America. Petition for a writ of certiorari and exhibit thereto. Filed September 11, 1941. Term No. 602, O. T. 1941.

[fol. 170] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the Supreme Court of the State of Alabama is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration and decision of this application.

